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No.

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WAYNE ESTELLE, WARDEN,
Petitioner,

v.

DENNIS ROSA COLLAZO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a state court's determination that a confession was not the product of a violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), or other coercive police activity, is a finding of fact which is entitled to a presumption of correctness under 28 U.S.C. § 2254(d).

2. Whether a state court's determination that a defendant validly waived his rights under *Miranda* v. *Arizona* is a finding of fact which is entitled to a presumption of correctness on federal habeas corpus.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	3
STATUTORY PROVISION INVOLVED	4
STATEMENT	5
1. State Proceedings	5
2. Federal Proceedings	5
3. Statement Of The Facts	6
a. The Conspiracy And Murder	6
b. Respondent's Statement	11
c. Findings Of State Courts	12
REASONS FOR GRANTING THE PETITION	13
CONCLUSION	23

TABLE OF AUTHORITIES

	Page
Cases	
Bryan v. *Warden* 820 F.2d 217 (7th Cir. 1987)	20
Carella v. *California* 491 U.S. 263 (1989)	16
Colorado v. *Connelly* 479 U.S. 157 (1986)	16, 18
Colorado v. *Spring* 479 U.S. 564 (1987)	20
Culombe v. *Connecticut* 367 U.S. 568 (1961)	16
La Vallee v. *Delle Rose* 410 U.S. 690 (1973)	20
Lego v. *Twomey* 404 U.S. 477 (1972)	18
Lisenba v. *California* 314 U.S. 219 (1941)	16
Lyons v. *Oklahoma* 322 U.S. 596 (1944)	16
Michigan v. *Tucker* 417 U.S. 433 (1974)	21

TABLE OF AUTHORITIES (Cont'd)

	Page
Cases (cont'd)	
Mikel v. *Thieret* 887 F.2d 733 (7th Cir. 1989)	20
Miller v. *Fenton* 474 U.S. 104 (1985)	13-15, 17, 19-21
Miranda v. *Arizona* 384 U.S. 436 (1966)	2, 11, 13-15, 20-22
Moran v. *Burbine* 475 U.S. 412 (1986)	20
Murray v. *United States* 487 U.S. 533 (1988)	17, 18
New York v. *Quarles* 467 U.S. 649 (1984)	21
Nix v. *Williams* 467 U.S. 431 (1984)	17, 18
Oregon v. *Elstad* 470 U.S. 298 (1985)	13, 21
People v. *Duren* 9 Cal.3d 218 107 Cal.Rptr. 157 507 P.2d 1365 (1973)	20

TABLE OF AUTHORITIES (Cont'd)

Page

Cases (cont'd)

Ray v. *Duckworth*
881 F.2d 512 (7th Cir. 1989) 20

Reck v. *Pate*
367 U.S. 433 (1961) 16

Townsend v. *Sain*
372 U.S. 293 (1963) 14, 15

United States v. *Leon*
468 U.S. 897 (1984) 15

United States v. *Wade*
388 U.S. 218 (1967) 18

Wong Sun v. *United States*
371 U.S. 471 (1963) 17

Constitutional Provisions

United States Constitution
V Amendment 21
XIV Amendment 21

TABLE OF AUTHORITIES (Cont'd)

	Page
Statutes	
California Penal Code	
§ 182	5
§ 187	5
§ 459	5
§ 12022	5
Supreme Court Rules	
rule 13.1	3
United States Code	
title 28, § 1254(1)	3
title 28, § 2101(c)	3
title 28, § 2254	4
title 28, § 2254(d)	13, 18

APPENDICES

TABLE OF CONTENTS

Page

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JULY 18, 1991 1

EN BANC OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ORDERED MAY 30, 1990 63

UNITED STATES DISTRICT COURT (NORTHERN DISTRICT OF CALIFORNIA) ORDER DENYING APPLICATION FOR WRIT OF HABEAS DATED FEBRUARY 22, 1988 74

OPINION OF THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT FILED MAY 21, 1986 77

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WAYNE ESTELLE, WARDEN,
Petitioner,

v.

DENNIS ROSA COLLAZO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed July 18, 1991.

OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the Ninth Circuit (App. A, *infra*, 1-62), is not yet reported. The vacated opinion of the three-judge panel (App. B, *infra*, 63-73), was reported at 898 F.2d 87. The order of the District Court (App. C, *infra*, 74-76), was unreported. The opinion of the California Court of Appeal, First Appellate District (App. D, *infra* 77-101), was unreported.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 18, 1991. This petition for writ of certiorari followed within 90 days. 28 U.S.C. § 2101(c); Supreme Court Rule 13.1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 28, section 2254 provides in pertinent part:

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. . . .

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct. . . ."

STATEMENT

1. State Proceedings

By an information filed in Santa Clara County Superior Court on November 8, 1982, respondent Dennis Rosa Collazo and two codefendants were charged with murder, burglary and conspiracy to commit robbery, burglary and theft, in violation of California Penal Code sections 187, 459 and 182. Three overt acts were alleged in conjunction with the conspiracy count. It was further alleged that all three defendants were armed with a firearm within the meaning of California Penal Code section 12022.

On May 5, 1983, the jury found respondent guilty as charged. Respondent was sentenced to 26 years to life imprisonment.

On May 21, 1986, the California Court of Appeal for the First Appellate District affirmed the judgment of conviction. On August 28, 1986, the California Supreme Court denied review.

2. Federal Proceedings

On July 9, 1987, respondent filed a petition for writ of habeas corpus in the United States District Court for the Northern District of California. On February 22, 1988, the court denied the petition without a request for

opposition. On March 24, 1988, the district court issued a certificate of probable cause.

Upon respondent's appeal to the Court of Appeals for the Ninth Circuit, the court on September 9, 1989, affirmed the district court's order. The court modified its opinion on March 14, 1990 and May 8, 1990. On May 30, 1990, the court of appeals ordered rehearing en banc. On July 18, 1991, the court of appeals reversed the judgment of the district court and directed the district court to issue the writ of habeas corpus.

3. Statement Of The Facts

The opinion of the California Court of Appeal provides a summary of the events which led to respondent's conviction and the events which resulted in respondent's statement to the police.

a. The Conspiracy And Murder

> "The events at issue have their origin in the drug-related problems of Madelyn (or Madeline) Medina, who is [respondent's] niece. By the summer of 1982 she had run up a considerable debt for cocaine to her dealer, Douglas Metzger. [Respondent], who worked for the Federal Drug Enforcement Administration (DEA), was aware

of this situation and the fact that Medina had been threatened by the dealer if she did not pay. In early September of that year Medina asked [respondent] if he could 'set up' the dealer and have him imprisoned. Nothing came of this because Medina refused to testify against the dealer and [respondent] believed the dealer was too small for the DEA to go after.

"The following events occurred on September 13, 1982:

"[Respondent] received an early morning telephone call from Medina, who asked him to come to her apartment to discuss her problem. [Respondent] drove his silver Datsun 280Z to East Palo Alto, where he picked up his cousin, Ricky Laureano. Telling Laureano that they were going to make some money, [respondent] drove them to Medina's San Jose apartment. Inside the apartment were Medina and Ernie Garcia, her boyfriend. Medina proposed that they 'rip off' the dealer. She drew a diagram of the dealer's house, indicating where drugs and money were located. Medina and Garcia made statements that the dealer would not be present and only his wife would be in the house; that no gun would be in the house; that 'it could be done'; and that 'it was easy'. [Respondent] told Medina: 'Let's go, let's go on with this

program.'

"The four drove in separate vehicles to a store, where Garcia bought some tape to be put over the mouth of the dealer's wife. Laureano left [respondent's] vehicle, Medina got in, and she and [respondent] drove away. Medina showed [respondent] the dealer's house. They returned to the store, where Medina got out of [respondent's] vehicle and Laureano reentered it. As they were driving to the dealer's house, [respondent] told Laureano that the tape (which [respondent] now had) was to be put on 'the lady's mouth so that she couldn't say anything'; that no one was to be hurt; that they were going to a house and [respondent] wanted Laureano to 'go by the door with him'; that this was how Laureano would make money; and that 'this job can be pulled off because it's really easy' and the lady 'is not going to fight'.

"[Respondent] parked his Datsun near the Metzger house. He admitted that he went there to 'rip off this guy,' but as he and Laureano were walking towards the house he decided it was 'a foolish thing to do.' They returned to the Datsun and drove around the corner to where Medina and Garcia were waiting. [Respondent] left his automobile, spoke to Garcia and Medina briefly, and then returned to his Datsun.

[Respondent] told Laureano that it was 'no good.' [Respondent] drove Laureano home.

"Later that night, at a birthday party for her daughter, Medina suggested to [respondent] that he talk to the dealer. She told respondent that she would call somebody to go with him. [Respondent] agreed. Medina had earlier made a telephone call to Durey Watson at about 6:30, asking Watson for help in the form of 'a backup.' Watson told her to call back at about 8:30. [Respondent] was with Madelyn at approximately 8:30 when she made some telephone calls. Watson was not home at that time, but a black man named Tony Young apparently was.

"After [respondent] collected the keys to his Datsun from his wife at the party, he and Medina went to a store where they met Young. Madelyn explained what [respondent] and Young were supposed to do. Young had a gun, but both [respondent] and Medina told him there was no need for it. In separate vehicles, [respondent] and Young proceeded to Metzger's house.

"When [respondent] and Young knocked on the front door at about 10:30, it was answered by Mrs. Metzger. [Respondent] asked to speak to Mr. Metzger. As Metzger was coming to the

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door, [respondent] (who was observed by Mrs. Metzger to have a gun) and Young rushed in. The three men began fighting for possession of the gun. Metzger yelled to his wife to get help. He also yelled, 'My wife. My kids,' to which either [respondent] or Young replied: 'We are not here for your wife or your kids, we are here for you.'

"Mrs. Metzger ran to a neighbor's house, asked that police be summoned, and returned to her home. Seeing that the fight was still going on, Mrs. Metzger threw a log through a window. Some broken glass hit [respondent]. Mrs. Metzger yelled that police were coming. Returning to her neighbor's house, she saw [respondent] run out of the house several seconds later. He ran to his vehicle and drove away quickly. Thereafter Mrs. Metzger heard several gunshots and saw Young run out of her house.

"Metzger died that night from two gunshot wounds to his chest. [Respondent] went to Mexico (apparently on DEA business) and was arrested two weeks later. App. D, pp. 2-5; fns. omitted.

b. **Respondent's Statement**

"[Respondent] was arrested at about 11:15 a.m. on September 27. He was first interviewed by Sergeants Destro and Rolen at about 1 p.m. that same day. [Respondent] was advised of his *Miranda* rights. He invoked those rights by telling the officers 'I want to talk to a lawyer.' One of the officers responded: 'Once you get a lawyer, you're going to say forget it, don't talk to the police. Then it might be worse for you.' When [respondent] asked 'Why?' the officer explained: 'Because there's other people involved in this thing and we would like to get everybody.' The interview was thereafter terminated and [respondent] was allowed to call his wife, who is a legal secretary.

"When Sergeants Destro and Rolen left to arrest Ms. Medina, [respondent] was left with Sergeant Parrott. [Respondent's] wife arrived and spoke with him in the interview room. [Respondent] asked Parrott 'Where are the investigators?' Parrott construed this as indicating that [respondent] 'wanted to talk to them.' Parrott contacted Destro and Rolen in the field and told them that [respondent] 'wanted to talk to them as soon as they could get back.'

> Rolen and Destro arrived at about 4 p.m. and met with [respondent]. [Respondent] was again advised of his constitutional rights. He made numerous incriminating admissions in the ensuing conversation.
>
> "The focus of the contradicted testimony is very narrow. [Respondent] testified that at the end of the first interview Destro told him that 'I better talk to them because . . . somebody was looking for me to kill me.' Destro and Rolen denied that any such statement had been made. [Respondent] testified that as a result of this purported comment 'I was threatened by the police' and that this was why he agreed to talk to the officers." App. D, pp. 6-8.

c. **Findings Of State Courts**

The trial court found, and the court of appeal agreed, that the prosecution had proved by a preponderance of evidence that there was "a break in the causative chain between the interrogation sessions." App. D, p. 9. For that reason, the courts concluded that respondent "did indeed volutarily cause the officers to be recalled from the field for a subsequent interivew." *Id.*

REASONS FOR GRANTING THE PETITION

In *Miller* v. *Fenton*, 474 U.S. 104 (1985), this Court held that the voluntariness of a confession under the Due Process Clause was a question of law requiring independent federal determination in a habeas corpus proceeding. Applying this principle to the present case, the Ninth Circuit held that the validity of a waiver under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), was also a legal question, the resolution of which by the state courts was not presumptively correct under 28 U.S.C. § 2254(d). The Ninth Circuit independently found that the police officer's attempts to interrogate respondent violated both *Miranda* and the Due Process Clause, and that the confession, given hours later, was the product of that illegal police conduct.

Petitioner does not dispute that the officer's conduct was constitutionally improper. But that marks the beginning, not the end, of judicial inquiry into the admissibility of respondent's confession. Having found coercive conduct, whether actual coercion under the Due Process Clause or presumptive coercion under *Miranda* (*see Oregon* v. *Elstad*, 470 U.S. 298, 307 (1985)), any reviewing court must then determine whether the suspect's statement was not simply *subsequent* but was *consequent*. If the defendant's statement is motivated not by coercion but by considerations unrelated to state action, the statement is admissible. That is, the Constitution requires

that the statement be the *product* of state action.

The suspect's motivation to confess is a question of historical fact. If, as here, a state court finds that police misconduct did not induce a suspect to confess, that is a finding of fact to which the federal habeas court must give deference. If that finding is fairly supported by the record, the writ of habeas corpus must be denied. The Ninth Circuit erred by failing to defer to the state courts' finding that respondent's confession was not the product of coercion.

In addition, the Ninth Circuit erred by treating the validity of a *Miranda* waiver as a mixed question of law and fact. *Miranda* is not constitutionally compelled, but is a prophylactic rule intended to protect other constitutional rights. Because those rights are protected by *de novo* review, it is inappropriate to treat the waiver of *Miranda* rights as a question of law.

1. Petitioner does not challenge the holding of *Miller* v. *Fenton*, *supra*, that the voluntariness of a confession is not a question of fact. The Court carefully and persuasively explained in *Miller* that *stare decisis*, congressional intent, and the nature of the inquiry all "militate[ ] against treating the question as one of simple historical fact." 474 U.S. at 116. No reason exists to alter the traditional understanding that the "ultimate constitutional question" of the admissibility of a confession is a "mixed questio[n] of fact and law . . . ." *Townsend* v. *Sain*, 372 U.S. 293, 309 & n. 6 (1963). However, it is

necessary to identify which questions are factual and which are legal.

As the Court noted in *Miller*, "subsidiary questions, such as the length and circumstances of the interrogation, the defendant's prior experience with the legal process, and familiarity with the *Miranda* warnings, often require the resolution of conflicting testimony of police and defendant. The law is therefore clear that state court findings on such matters are conclusive on the habeas court if fairly supported in the record . . . ." 474 U.S. at 117; *accord, Townsend* v. *Sain*, 372 U.S. at 309 n. 6.

On the other hand, whether the facts as found constitute coercion is distinctly a legal question. As *Miller* cogently observed, a state-court judge is in no better position than a federal habeas court to make a legal characterization of facts, especially as to those events which have transpired "in a secret and inherently more coercive environment." 474 U.S. at 117. In addition, only *de novo* review of the issue of coercion enables federal courts to control police practices in the station house. *Cf. United States* v. *Leon*, 468 U.S. 897, 924 (1984).

But the exclusion of a confession requires more than the finding of official coercion. A connection must exist between the coercive activity and the subsequent statement: the confession must be the *product* of governmental misconduct. As the Court observed in a somewhat different context, "[a]bsent police conduct

causally related to the confession, there is simply no basis for concluding that any state action has deprived a criminal defendant of due process of law." *Colorado* v. *Connelly*, 479 U.S. 157, 164 (1986). This statement is merely a reiteration of the well-established principle that a confession may not be suppressed without the existence of both coercion and causation. *E.g., Culombe* v. *Connecticut*, 367 U.S. 568, 605 (1961) (Opinion of Frankfurter, J.) ("where these forces . . . . are powerful enough to draw forth a confession"); *Reck* v. *Pate*, 367 U.S. 433, 440 (1961) ("confession was extracted by coercion"); *Lyons* v. *Oklahoma*, 322 U.S. 596, 604-605 (1944) (second confession not the product of earlier involuntary statement); *Lisenba* v. *California*, 314 U.S. 219, 240 (1941) (illegal conduct did not coerce confession). The question presented by petitioner is whether the suspect's motivation to confess is an issue of fact or of law.

It is almost invariably true that the intent of a criminal defendant presents a question of fact for the trier of fact to determine. Thus, a jury must decide whether a defendant charged with burglary intended to commit larceny or some other felony when he entered the dwelling of another. Indeed, the defendant is constitutionally entitled to have this issue treated as a question of fact. *E.g., Carella* v. *California*, 491 U.S. 263, 265 (1989) (*per curiam*). It is another matter, however, whether a defendant's motivation to confess should be

similarly treated.

Miller does not resolve this issue because the facts of that case uncontrovertibly established that the suspect's statement was induced by the interrogation of the officers. 474 U.S. at 106-108. Indeed, in most cases, it is beyond dispute that the confession was the product of police questioning. The only issue is whether the conduct was coercive, a question of law. This case presents the question, not involved in *Miller*, whether the suspect's decision to reinitiate the interview, and subsequently to confess, was in the first instance the product of illegal police activity.

The doctrine of fruit of the poisonous tree provides guidance. Illegal police conduct does not, of course, irrevocably taint subsequently discovered evidence. *Wong Sun* v. *United States*, 371 U.S. 471 (1963). The prosecution may introduce such evidence if it can show attenuation (*id.*), inevitable discovery (*Nix* v. *Williams*, 467 U.S. 431 (1984)), or independent source (*Murray* v. *United States*, 487 U.S. 533 (1988)). The doctrine of attenuation is inapplicable here because it presumes causation. Petitioner's claim that a causal link between the police conduct and the decision to confess was absent implicates the independent source rule.

This rule is based upon the sensible thesis that suppression of evidence which would have been discovered in the absence of police illegality "would put the police in a worse position than they would have been in if no

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unlawful conduct had transpired." *Nix* v. *Williams*, at 445. The appropriate question to ask is "whether it would have been [volunteered] even if what had happened had not occurred. . . . Clearly that much is needed to assure that what comes before the court is not the product of illegality. . . ." *Murray* v. *United States*, at 542, n. 3. In the situation which this case presents, a court must presume that a confession which follows coercive conduct is also the product of that conduct. *Cf. United States* v. *Wade*, 388 U.S. 218, 240-241 (1967). If the prosecution cannot adduce evidence to rebut that presumption, the statement must be excluded. However, if the prosecution can show by preponderant evidence that the defendant's decision to confess was not the product of overbearing police conduct (*Nix* v. *Williams*, 467 U.S. at 444, n.5; *cf. Colorado* v. *Connelly*, 479 U.S. at 168; *Lego* v. *Twomey*, 404 U.S. 477 (1972)), the confession should be admitted.

The reasons for treating coercion as a question of law are inapplicable to historical causation, even in the context of the motive to confess. First, this Court traditionally has regarded the determination of independent source as fact-specific (*e.g., Nix* v. *Williams*, 467 U.S. at 448-450), and no reason exists to believe that Congress intended to alter this characterization by its enactment of 28 U.S.C. § 2254(d).

Second, the defendant typically testifies about the circumstances of the interrogation and the reasons why he confessed; thus, it cannot be said that "assessments of

credibility and demeanor are not crucial to the proper resolution" (*Miller* v. *Fenton*, 474 U.S. at 116-117) of causation.

Third, although the confession is usually elicited during incommunicado custody (*id.* at 117), only the defendant can provide direct evidence of his motivation to confess. At best, the prosecution can marshal indirect, circumstantial evidence. As *Miller* sagely observed, "that an issue involves an inquiry into state of mind is not at all inconsistent with treating it as a question of fact." 474 U.S. at 113. The presumption of inadmissibility, combined with the defendant's unique ability to testify about his state of mind, decreases "the risk that erroneous resolution of the [causation] question might inadvertently frustrate the protection of the federal right." *Miller*, at 117.

Finally, the question whether police conduct amounted to coercion is, and will remain, a legal issue requiring independent federal determination. In the large majority of cases, because confessions are indisputably the product of police interrogations, the sole issue will be whether the interrogation was coercive. Federal courts will continue to provide *de novo* review of the admissibility of confessions in the exercise of their unquestioned role as guardians of federal rights.

Judged by this analysis, the Ninth Circuit erred in its selection of the applicable standard to determine the admissibility of the confession. The state courts expressly found that respondent's decision to confess was not the

product of a *Miranda* violation. The state appellate court opinion applied the correct legal standard to the question whether the officers' conduct violated *Miranda*. *Cf. La Vallee* v. *Delle Rose*, 410 U.S. 690 (1973) (*per curiam*). Accordingly, on federal habeas corpus, the factual finding by the state court that respondent's confession was not the product of official coercion is entitled to a presumption of correctness which the Ninth Circuit erroneously failed to accord.

2. In *Miller* v. *Fenton*, *supra*, the Court reserved the question "whether federal habeas courts must accord the statutory presumption of correctness to state-court findings concerning the validity of a [*Miranda*] waiver." 474 U.S. at 108, n.3. The Ninth Circuit reasoned that a waiver of *Miranda* was a mixed question of fact and law, a ruling which is both erroneous, and in conflict with another circuit (*Mikel* v. *Thieret*, 887 F.2d 733, 739 (7th Cir. 1989); *Ray* v. *Duckworth*, 881 F.2d 512, 518 (7th Cir. 1989); *Bryan* v. *Warden*, 820 F.2d 217, 219 (7th Cir. 1987)), and the California Supreme Court. *People* v. *Duren*, 9 Cal.3d 218, 238, 107 Cal.Rptr. 157, 507 P.2d 1365 (1973).

The Ninth Circuit premised its holding on the requirement that a valid *Miranda* waiver must be knowing, intelligent, and voluntary. *Colorado* v. *Spring*, 479 U.S. 564, 573 (1987); *Moran* v. *Burbine*, 475 U.S. 412, 421 (1986). Because voluntariness is a question of law, the Ninth Circuit concluded that the "voluntariness" of a

Miranda waiver was also subject to *de novo* review. This somewhat mechanical analysis ignored the fact that *Miranda* is not constitutionally compelled and, accordingly, no justification exists for independent federal review of an asserted violation.

It is now firmly established that *Miranda* warnings are not rights protected by the Constitution but instead are intended to protect the right against self-incrimination guaranteed by the Fifth Amendment. *New York* v. *Quarles*, 467 U.S. 649, 654 (1984); *Michigan* v. *Tucker*, 417 U.S. 433, 444 (1974). *Miranda* sweeps more broadly than the Fifth Amendment itself and may be triggered even in the absence of a Fifth Amendment violation. *Oregon* v. *Elstad*, 470 U.S. 298, 306 (1985). "A *Miranda* violation does not *constitute* coercion but rather affords a bright-line, legal presumption of coercion. . . ." *Id.* at 306 n.1.

Miller v. *Fenton*, *supra*, teaches that a federal claim may be denominated as a question of law to better enable federal courts to protect constitutional rights. That rationale is wholly inapplicable to *Miranda*, which is intended only to protect other constitutional guarantees. Furthermore, in view of the *de novo* standard of review for "true" coercion claims, it is redundant to apply the same standard to the question whether a prophylactic rule such as *Miranda* was faithfully observed.

The Ninth Circuit held that the officer's statement was coercive under the Fourteenth Amendment

as well as a *Miranda* violation. This finding of coercion, which the Court may review *de novo*, is patently erroneous. The officer's comment came at the end of a interview, which the officer terminated at respondent's request. After conferring with his family, respondent asked to speak with investigators several hours later. As the state courts and district court found, and the concurring and dissenting opinions in the Ninth Circuit agreed, the officer's statement was not coercive within the meaning of the Due Process Clause. To the extent that it may have violated *Miranda*, the state courts found that the subsequent waiver was not a product of the violation. The Ninth Circuit erred by failing to defer to this finding of fact.

CONCLUSION

For the foregoing reasons, we respectfully ask that the Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit be granted.

DATED: September 27, 1991

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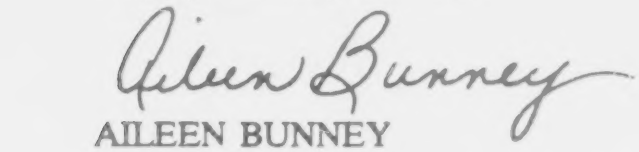

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DENNIS ROSA COLLAZO,

Petitioner-Appellant,

v.

WAYNE ESTELLE, Warden, California Mens Colony,

Respondent-Appellee.

No. 88-2443

D.C. No. CV-87-20481-RPA

OPINION

Appeal from the United States District Court
for the Northern District of California
Robert P. Aguilar, District Judge, Presiding

Argued En Banc and Submitted
October 9, 1990--San Francisco, California

Filed July 18, 1991

Before: Goodwin, Hug, Fletcher, Poole, D.W. Nelson, Reinhardt, Beezer, Kozinski, Noonan, O'Scannlain, and Trott, Circuit Judges.

Opinion by Judge Trott; Concurrence by Judge Kozinski; Dissent by Judge Goodwin; Dissent by Judge O'Scannlain, with whom Beezer and Noonan, Circuit Judges, joined.

SUMMARY

Criminal Procedure

Reversing and remanding a district court judgment denying habeas relief, the court of Appeals, en banc, held

that a suspect's constitutional rights were violated when neither his request to talk to police interrogators, alleged *Miranda* waiver, and custodial confession were voluntary.

Appellant Dennis Rosa Collazo was convicted by a jury of various charges, including felony murder. During initial custodial interrogation following his arrest and after being fully advised of his *Miranda* rights, Collazo asked to talk to a lawyer. The police responded to his request by telling Collazo it "might be worse" for him if he talked to an attorney, and that it was in his interest to talk to them without one. After the police departed, Collazo was allowed to see his wife, a legal secretary. Three hours later, Collazo asked to speak to the police. Collazo was again advised of his *Miranda* rights, indicated that he had changed his mind and was now willing to talk. After unsuccessfully attempting to suppress his incriminating statements to the police on the ground that they were the product of impermissible coercion, Collazo was convicted in state court. After exhaustion of all state remedies, Collazo filed a petition in federal court for habeas relief, which was denied. On appeal, Collazo argued that his confession was involuntary, the alleged waiver of his *Miranda* rights before confessing was nothing more than the unlawful product of coercive tactics, and the use of his statement against him was not harmless error.

[1] A federal court reviewing the admissibility of a confession is not bound by a state court finding of voluntariness but has a duty to make an independent evaluation of the record. [2] While the court reviewed for clear error the question of whether Collazo's mind was overborne, the state trial court's determination that Collazo knowingly and intelligently waived his *Miranda* rights was entitled to a presumption of correctness. [3]

Thus, applying the traditional fifth amendment voluntariness test, the police officer's remarks to Collazo, understood plainly, were coercive. The officer's words were calculated to pressure Collazo into changing his mind about remaining silent, and into talking without counsel to his interrogators.

[4] Interrogation tactics need not be violent or physical in nature to be deemed coercive. Psychological coercion is equally likely to result in involuntary statements, and thus is also forbidden. [5] The officer's attempt in the police station to impose a penalty on Collazo's choice to remain silent amounted to a serious infringmenet of his fifth amendment rights against compulsory self-incrimination. [6] The officer's immediate interrogation of Collazo in direct response to his request for a lawyer was a textbook violation of *Edwards v. Arizona*. What the officer did could only be seen as badgering Collazo in the manner prescribed by *Edwards*. [7] In addition, the officer demeaned the pre-trial role of counsel by dispensing a one-sided, unauthorized legal opinion regarding whether Collazo should remain silent and exercise his right to counsel.

[8] The court's plenary review of the tactics used by the police in an attempt to pressure Collazo into talking led to a two-part conclusion. First, the officer's tactics added up to a flagrant breach of the prophylactic rules established by *Miranda* to protect a defendant's Constitutional right against self-incrimination. Second, the officer's overreaching behavior violated not only *Miranda*, but also the general Constitutional prohibition against coercive interrogation practices likely to result in involuntary responses. The officer's inquisitorial stratagem, calculated to break Collazo's will, offended the fourteenth

amendment's guarantee of due process. [9] Consequently, the court found that Collazo's initiation of the communication leading to the second interrogation was the product of the coercive statements made by the police during the first illegal interrogation.

[10] In determining whether the initial coercion tainted both Collazo's request to see his interrogators as well as his alleged waiver, the court applied the traditional test for deciding whether each was voluntary as the result of the exercise of Collazo's free will. [11] Applying the *Patterson* factors that are relevant to determining the effect of previous police coercion to the facts of this case, the court had to determine whether, granting establishment of the primary illegality, the evidence to which objection was made was come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. [12] The court concluded that Collazo's alleged waiver and confession were not voluntary. Under the circumstances, the passage of only three hours was insignificant, even when coupled with Collazo's unreported discussion with his wife. Collazo's conversation with his wife did not dissipate any taint that might have resulted from the officer's warning since Collazo was entitled to the presence of an attorney, not a legal secretary. Collazo's past experience working with law enforcement as a DEA operative and informant was at best a neutral factor. Moreover, the police did nothing to erase their transgression. [13] Most importantly, a review of Collazo's alleged waiver and confession provided unmistakable evidence that no break in the causal chain or stream of events had occurred. [14] The court concluded that the officer's threats about things "going worse" for Collazo if he sought a lawyer and did not cooperate were a primary motivating factor in his

about-face and decision to talk without counsel. [15] Under the circumstances, the officer's readvice of rights and Collazo's alleged waiver of them was an empty ceremony.

[16] Although the words and even the actions that could normally be construed as "initiation" were present at the outset of the second encounter, an anlysis of the substance of the entire transaction--rather than the isolated form of the second encounter--demonstrated that Collazo did not "initiate" further conversation as that term is used in *Edwards*. Collazo's words and actions in calling back the interrogating officers and in "waiving" his rights were nothing less than the delayed product of the officer's admonitory adventure three hours previously, and hence were "initiated" by the police, not by Collazo.

[17] It was impossible for the court to conclude that Collazo's coerced statement did not contribute to his conviction. The taped statement was clearly not unimportant in relation to everything else the jury considered on the issue. Thus, the state failed to sustain its burden of showing beyond a reasonable doubt that the admission was evidence of Collazo's statement and its use during the trial was harmless error.

Concurring, Judge Kozinski stated that were the court deciding only the issue of whether Collazo's confession was coerced, he would have no difficulty concluding that it was not. However, he joined the majority because the Supreme Court has said that voluntariness is not merely a fact-bound question whether a particular suspect's confession is the product of coercion, but also a legal question about whether the techniques the police used were tolerable. In his view, the police forfeit the benefit

of the *Edwards* exception once they use the type of pressure tactics demonstrated in this case.

Dissenting separately, Judge Goodwin believed that Collazo knowingly called back the officers, not because he was menaced or coerced, but because he apparently thought he could improve his situation by appearing to cooperate.

Judge O'Scannlain, joined by Judges Beezer and Noonan also dissented. They stated that under a plain reading of the facts and the *Bradshaw* and *Edwards* rules, Collazo's confessison was both voluntary and legally admissible in the case against him. The "totality of the circumstances" clearly revealed that Collazo voluntarily initiated the discussion during which he confessed and, further, that he initiated that discussion precisely to confess.

COUNSEL

William D. Farber, San Rafael, California, for the petitioner-appellant.

Aileen Bunney, Supervising Deputy Attorney General, San Francisco, California, for the respondent-appellee.

OPINION

TROTT, Circuit Judge:

Appellant Collazo was arrested for murder and advised of his *Miranda* rights. He declined to waive them, asking instead to talk to a lawyer. The police responded to his request by telling Collazo it "might be worse" for

him if he talked to an attorney, and that it was in his interest to talk to them without one. Three hours later, he "changed his mind," was readvised of his rights, and talked to the police. What he told them was used to convict him and send him to prison. We are called on in this appeal to examine the conduct of the police leading up to Collazo's confession, and to decide in light of that conduct whether Collazo was denied due process when his confession was introduced in evidence. We conclude that Collazo's confession was involuntary, and that its use to convict him violated his Constitutional rights. We reverse the district court.

I

On September 27, 1982, Dennis Collazo, an occasional informant and undercover operative for the Drug Enforcement Administration, was arrested for the murder of Douglas Metzger. Metzger often sold cocaine to Collazo's niece, who owed Metzger a considerable debt arising from her purchases. When Collazo's niece expressed a desire to free herself from her drug debt, Collazo and Tony Young, one of Collazo's confederates, attempted an armed robbery of Metzger. The robbery turned into a brawl, and Young shot Metzger. After the murder, Collazo went to Mexico (apparently on DEA business), and was arrested on his return.[1]

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1. We glean the facts of this case from *People v. Collazo*, No. A 031327 (Cal. 4th Dist. May 21, 1986) (unpublished), from the Reporter's Transcript of Collazo's trial, and from the tape recordings of his conversation with the police.

After the arrest, Collazo was escorted to an interview room in the San Jose Police Station where Officer Rolen fully advised him of his *Miranda* rights. In response, he asked to talk to his wife. The police denied this request. After some discussion about where he was on the day of the murder and another rejected request to talk to his wife, Collazo requested to talk to a lawyer. Instead of respecting his request, however, Officer Destro (Officer Rolen's partner) attempted to pressure him into dispensing with counsel and talking to them about the homicide.[2/] A transcript of the conversation follows:

> COLLAZO: Oh, you know, ah, can I, you know, talk to a lawyer?
>
> Destro: It's up to you. This is your last chance to talk to us, though.
>
> Collazo: I understand that.
>
> Destro: Once you get a lawyer, he's gonna say forget it. You know, don't talk to the police. Then it might be worse for you.
>
> Collazo: Pardon me?
>
> Destro: Then it might be worse for you.
>
> Collazo: Why?

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2. At oral argument, California conceded that "pressuring" is an appropriate characterization of Officer Destro's tactics.

Destro: Because, ah, you know, there's other people involved in this thing, and we would like to get everybody. If you don't want to talk about it, uh-

Rolen: Well, he's asked for a lawyer, so why don't we, I guess we'll end our interview right there.

Collazo: If, ah, if ah, this gonna be stupid for you, you know, for me it means a lot, you know.

Destro: If you're arrested for murder, it does mean a lot.

The police then departed, leaving Collazo in the interview room to ponder Officer Destro's inappropriate admonition and to consider whether he could afford to exercise his Constitutional rights.

Collazo was then permitted to call and to see his wife, a legal secretary. She came to the police station and had a lengthy discussion with him, the substance of which is unknown. Some three hours after the officers' departure, Collazo contacted a sergeant and asked, "Where are the investigators?" The sergeant correctly construed this as a request to talk to them, and they were so notified and returned to the station. Collazo was again advised of his *Miranda* rights, and indicated he had changed his mind and was now willing to talk. He then essentially confessed to his nonshooting role in the crimes for which he had been charged and arrested.

In state court, Collazo unsuccessfully attempted to suppress his incriminating statements on the ground that they were the product of impermissible coercion and thus a violation of his Constitutional rights. He argued that the

formal waiver of his *Miranda* rights was nothing more than the involuntary product of previous threats. At trial, his taped statement, the truthfulness of which he partially repudiated, was admitted in evidence over his objection. Collazo was convicted by a jury of felony murder, burglary, and conspiracy to commit robbery, burglary, and theft. For these crimes he was sentenced to state prison for a term of 26 years to life.

Collazo pursued his case on appeal through the state courts in California, attacking his confession as the direct product of a violation of his federal Constitutional rights. He was not successful and after exhausting all state remedies, he filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California. His petition was denied, but a certificate of probable cause was issued.

On appeal, Collazo argues (1) his confession was involuntary, and (2) the alleged waiver he articulated before confessing was nothing more than the unlawful product of coercive tactics, and (3) the use of his statement against him was not harmless error.

II

We confront a state court record containing factual findings on the relevant issues. California argues that these findings, insofar as they pertain to the validity of the alleged waiver, are entitled to the presumption of correctness mandated by 28 U.S.C. § 2254(d).[3/]

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3. After listening to tapes of the interview and testimony from witnesses, the trial court found Collazo's

Therefore, we must first determine the appropriate standard of review that controls our analysis.

[1] We review de novo the voluntariness of Collazo's confession. *Miller v. Fenton*, 474 U.S. 104, 112 (1985), calls on us to determine "whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution . . . ," and to do so by subjecting the issue to "plenary federal review." A federal court reviewing the admissibility of a confession is not bound by a state court finding of voluntariness and has a "duty to make an independent evaluation of the record." *Mincey v. Arizona*, 437 U.S. 385, 398 (1978). More specifically, we are not bound by state court findings that the conduct of the interrogating officers was not coercive. As Chief Judge Wallace recently stated in *Derrick v. Peterson*, 924 F.2d 813, 818 (9th Cir. 1990), "we are obligated to conduct an independent review of the 'constitutional acceptability' of the . . . interrogation . . . ." We take a fresh look at whether the police used "objectively unacceptable methods to coerce [the defendant] into waiving his right[s] to silence . . . ." *United States v. Wolfe*, 813 F.2d 970, 976 n. 16 (9th Cir. 1987). In this regard, "the admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne." *Miller*, 474 U.S. at 116 (emphasis in

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confession was "voluntary beyond a reasonable doubt," and that there was "no taint whatsoever to his ultimate statement." Trial Transcript p. 193.

original).

Historical or subsidiary facts are treated differently, even though they may be dispositive of a Constitutional claim. *Id.* at 113. Such findings as whether the police in fact made the alleged threats are reviewed for clear error if made by a district court, and are presumed correct under section 2254(d) if made by a state court. "To be sure, subsidiary factual questions, such as . . . whether in fact the police engaged in the intimidation tactics alleged by the defendant . . . are entitled to the § 2254(d) presumption [of correctness]." *Id.* at 112 (citations omitted).

The standard of review does not change when the inquiry shifts from the voluntariness of the confession to the voluntariness of an asserted *Miranda* waiver.[4/] *Colorado v. Spring*, 479 U.S. 564, 573 (1987), makes it clear that "the inquiry whether a waiver is coerced 'has two distinct dimensions.'":

> "First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences

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4. *Miller v. Fenton* left this issue open: "The present case presents no occasion for us to address the question whether federal habeas courts must accord the statutory presumption of correctness to state-court findings concerning the validity of a waiver." *Miller*, 474 U.S. at 108 n.3.

> of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveal *both* an uncoerced choice *and* the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived."

(quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (emphasis added).

We review the voluntariness prong de novo:

> We agree with the Third Circuit and reaffirm *Grooms'* [*Grooms v. Keeney*, 826 F.2d 883, 887 (9th Cir. 1987)] adoption of a plenary standard of review because we find that the voluntariness of a waiver is a mixed question of law and fact that requires *de novo* review. A mixed question of law and fact warrants *de novo* review when "the application of law to fact will require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles."

Terrovona v. Kincheloe, 852 F.2d 424, 428 (9th Cir. 1988) (quoting *United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984)). *See also Derrick*, 924 F.2d at 822. Thus, as with the voluntariness of a confession, the voluntariness of a *Miranda* waiver is decided by first examining objectively the methods the police used to produce the waiver.

[2] But the calculus shifts when we focus on the awareness prong. In this dimension, "we review the question of whether the defendant's mind was overborne --i.e., was his waiver knowing and intelligent--for clear error." *Derrick*, 924 F.2d at 823. In the context of

collateral review, "a state trial court's determination that a defendant knowingly and intelligently waived his *Miranda* rights is entitled to a presumption of correctness pursuant to section 2254(d)." *Id.*

III

We now examine Officer Destro's response to Collazo's initial assertion of his *Miranda* rights. We must determine, as a threshold matter, whether Officer Destro's attempt to discourage Collazo from speaking to a lawyer is compatible with a system of justice that does not permit police coercion. We conclude it is not, and we so conclude for a multitude of reasons.[5]

[3] First, applying the traditional Fifth Amendment voluntariness test, Officer Destro's nine terse sentences, understood plainly, were coercive. His words were calculated to pressue Collazo into changing his mind about remaining silent, and into talking without counsel to his interrogators. Destro's warning that it "might be worse" for Collazo if he did not cooperate with the police can only be seen as menancing. During the suppression hearing, the prosecutor himself characterized Officer Destro's tone and presentation as "insistent." The tape of the interview confirms this description.

The use of coercive tactics by state law enforcement officers to pressure an arrestee into talking has been prohibited since 1936. *Brown v. Mississippi*, 297 U.S. 278 (1936) (use of a defendant's coerced confession in a state

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5. We further conclude, in Section IV, that Officer Destro's pressue on Collazo carried over to taint Collazo's subsequent waiver and confession.

criminal trial denies due process).[6] As the Supreme Court stated in *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961):

> The ultimate test remains that which hasbeen the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? . . . The line of distinction is that at which governing self-direction is lost *and compulsion, of whatever nature or however infused*, propels or helps to propel the confession.

(emphasis added). Twenty-eight years later, and eighteen years before the investigation in this case, the privilege against self-incrimination was held applicable to the states via the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1 (1964).

[4] Interrogation tactics need not be violent or physical in nature to be deemed coercive. Psychological coercion is equally likely to result in involuntary

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6. *See also Spano v. New York*. 360 U.S. 315, 320-321 (1959) ("The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those though to be criminals as from the actual criminals themselves.").

statements, and thus is also forbidden. *Mincey*, 437 U.S. at 401, provides us with guidance:

> There were not present in this case some of the gross abuses that have led the Court in other cases to find confessions involuntary, such as beatings . . . or "truth serums" . . . . But the "blood of the accused is not the only hallmark of an unconstitutional inquisition." . . . Determination of whether a statement is involuntary "requires more than a mere color-matching of cases." It requires careful evaluation of all the circumstances of the interrogation.

(citations omitted) (footnote omitted); *see also Spano* 360 U.S. at 321 ("[A]s law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated, our duty to enforce federal constitutional protections does not cease.").

[5] Second, Officer Destro not only resorted generally to coercive tactics, but in doing so he effectively told Collazo he would be penalized if he exercised rights guaranteed to him under the Constitution of the United States. Notwithstanding *Miranda's* attempt to "assure that the exercise of the [Fifth Amendment right to silence] will be scrupulously honored . . .," 384 U.S. at 479, Officer Destro attempted to impose a penalty on its invocation. The Supreme Court has held "while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings." *Doylve v. Ohio*, 426 U.S. 610, 618 (1976). *Doyle* went on to hold "the use for impeachment purposes of [an arrestee's] silence, at the time of arrest and after receiving *Miranda* warnings,

violate[s] the Due Process Clause of the Fourteenth Amendment." *Id.* at 619 (footnote omitted). It follows as night the day that Officer Destro's attempt in the police station to impose a penalty on Collazo's choice to remain silent amounts to a serious infringement of Collazo's Fifth Amendment right. *See also Michigan v. Tucker*, 417 U.S. 433, 442 (1974) ("[I]n *Miranda* . . . the privilege against compulsory self-incrimination was seen as the principal protection for a person facing police interrogation.").

Third, *Miranda* expresses concern about the compelling pressures that weigh upon a person in custody, pressures that can break a person's free will and cause that person to talk involuntarily. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). Here, Officer Destro took unfair advantage of these pressures. At a point where the law required him to back off, he did not "scrupulously honor" Collazo's right to cut off questioning; he stepped on it. Any minimally trained police officer should have known such pressure was improper and likely to produce involuntary statements. Thus, Officer Destro engaged in prohibited interrogation. *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980), points out "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." (footnote omitted).[7] *Innis* explicitly outlawed techniques likely to

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7. "By 'incriminating response' we refer to any response--whether inculpatory or exculpatory--that the *prosecution* may seek to introduce at trial." *Innis*, 446 U.S. at 301 n.5 (emphasis in original).

"'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination." *Id.* at 299 (quoting *Miranda*, 384 U.S. at 457-58); *see also Shedelbower v. Estelle*, 859 F.2d 727, 731 (9th Cir. 1988), *United States v. Gomez*, 927 F.2d 1530 (11th Cir. 1991), *United States v. Anderson*, 929 F.2d 96 (2d Cir. 1991).

[6] In this regard, Officer Destro's immediate interrogation of Collazo in direct response to his request for a lawyer is a textbook violation of *Edwards v. Arizona*, 451 U.S. 477 (1981). *Edwards* made it clear beyond doubt that "an accused, such as [Collazo], having expressed his desire to deal with the police only through counsel, is *not* subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-85 (emphasis added). At the point Officer Destro hectored Collazo, Collazo had not initiated further communication with the officers. In fact, he had terminated the exchange by asking for a lawyer. The goal of the Court in *Edwards* was "to protect an accused in police custody from being badgered by police officers . . . ," *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983). What Officer Destro did can only be seen as badgering Collazo in the precise manner that concerned the *Edwards* Court.

[7] Fourth, Officer Destro demeaned the pre-trial role of counsel articulated by the Supreme Court in *Miranda* and its progeny. He did so by dispensing a one-sided, unauthorized legal opinion regarding whether Collazo should remain silent and exercise his right to

counsel.[8/] This advice adds yet another unacceptable dimension to Officer Destro's methods. "[T]o a suspect who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel, any further interrogation without counsel having been provided will surely exacerbate whatever compulsion to speak the suspect may be feeling." *Arizona v. Roberson*, 486 U.S. 675, 686 (1988). As if this were not enough, Officer Destro inappropriately led Collazo to believe he could reap some legal benefit by excluding defense attorneys from the pre-trial process. Such a tactic is inconsistent with *Miranda's* stated purpose of making "the individual more acutely aware that he is faced with a phase of the adversary system--that he is not in the presence of persons acting solely in his interest." *Miranda*, 384 U.S. at 469. As it turned out, and with considerable irony, not only did matters *not* go better for Collazo by talking without an attorney rather than remaining silent, but his statements were used to send him to prison, possibly for life.

Thus, Officer Destro's statements subjected Collazo to menacing custodial interrogation in violation of *Brown v. Mississippi*, *Culombe*, *Miranda*, *Innis*, and *Edwards*. Officer Destro's words are an egregious violation of

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8. Officer Destro has a First Amendment right to have any opinion he wishes of *Miranda* and lawyers, but he is not free to express it in this context. During the hearing to suppress Collazo's statements, the prosecutor made the remarkable argument that what Destro told Collazo was true--"[A]ny defense attorney is going to tell his client not to talk to the police"--and the statement was therefore "harmless." This argument borders on the absurd.

Miranda--the essence of improper law enforcement behavior in response to the rules established in that the landmark case. We join with the dissent in characterizing this behavior as "improper and reprehensible."

California freely admits on appeal that "[t]he police violated Collazo's *Miranda* rights. . . ." What California fails to appreciate is that a breach of these rules not only has *Miranda* implications, but traditional voluntariness implications as well. Although *Miranda* "rights" are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected," *Tucker*, 417 U.S. at 444, when these measures are ignored, as they were in this case, a suspect's Constutional rights are directly affected. Destro's failure to comply with *Miranda* aggravated his coercive tactics. *See Clewis v. Texas*, 386 U.S. 707, 709 (1967) (*Miranda* transgressions are relevant on the issue of the voluntariness of a confession).

Returning to non-Miranda aspects of the traditional Fifth Amendment voluntariness test, we see that Officer Destro's words and tactics share much in common with other psychological ploys that have been scrutinized and found wanting. The Supreme Court noted in *Spring*, 479 U.S. at 576 n.8:

> In certain circumstances, the Court has found affirmative misrepresentations by the police sufficient to invalidate a suspect's waiver of the Fifth Amendment privilege. See, e.g., *Lynumn v. Illinois*, 372 U.S. 528 (1963) (misrepresentation by police officers that a suspect would be deprived of state financial aid for her dependent child if she failed to

> cooperate with authorities rendered the subsequent confession involuntary); *Spano v. New York*, 360 U.S. 315 (1959) (misrepresentation by the suspect's friend that the friend would lose his job as a police officer if the suspect failed to cooperate rendered his statement involuntary).

Destro's ploy also trespasses on our holding in *United States v. Tingle*, 658 F.2d 1332, 1336 (9th Cir. 1981), which condemned warnings by interrogators "that a lengthy prison term could be imposed, that [the arrestee] had a lot at stake, that her cooperation would be communicated to the prosecutor, that her failure to cooperate would be similarly communicated, and that she might not see her two-year-old child for a while . . . ." (footnotes omitted). Writing for the panel, Judge Reinhardt held that this litany, under the circumstances, constituted psychologically coercive tactics sufficient to render Tingle's subsequent confession involuntary.

We are not unaware of the complex challenges faced by law enforcement officers as they discharge their important and difficult responsibilities in accord with Constitutional principles and the rules designed to protect them. Nevertheless, this is a nation where the rule of law prevails, where ends do not justify inappropriate means. *Miranda* has been part of our law since 1966. Most law enforcement officers abide faithfully by its requirements even though they find them on occasion to be frustrating. As long as *Miranda* is on the books, it must be respected. In this case, it was not honored. It was disobeyed.

The present case is not one where we examine interrogation practices not addressed by the courts as of the time of the interrogation. Officer Destro's improper

admonition flew directly in the face of previously published rules and rights on the books for some time before Collazo's request. This disregard for established rules exacerbates the police conduct in question and it evokes Justice Brandeis' timeless dissenting remarks in *Olmstead v. United States*, 277 U.S. 438, 485 (1928):

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

We repeat this statement not to berate Officer Destro, but to remind all law enforcement officers of the importance of their responsibilities.

[8] Based on the foregoing, our plenary review of the tactics used by Officer Destro in an attempt to pressure Collazo into talking to his adversaries leads us to a two-part conclusion. First, Officer Destro's tactics add up to a flagrant breach of the prophylactic rules established by the Supreme Court in *Miranda* and its progeny to protect a defendant's Constitutional right against self-incrimination. Second, Officer Destro's overreaching behavior violated not only *Miranda*, but also the general Constitutional prohibition against coercive interrogation practices likely to result in involuntary

responses. Officer Destro's gambit was inconsistent with Collazo's Fifth Amendment right against self-incrimination as well as his right to consult an attorney. His inquisitorial stratagem was calculated to break Collazo's will. As such, it offends due process as guaranteed by the Fourteenth Amendment.

IV

If Collazo had confessed to his interrogators in immediate response to Officer Destro's pressure, his confession--for the reasons previously detailed--would have been mainfestly inadmissible, and our inquiry would be over. But Collazo's confession did not come until some three hours after Officer Destro's impropriety, and it was preceded by certain events to which California points in support of an argument that boils down to this proposition: By the time Collazo decided to talk, the taint of any earlier misconduct had evaporated, leaving Collazo free to decide on his own whether to "[initiate] further communication, exchanges, or conversations with the police." *Edwards*, 451 U.S. at 485.

In making this argument and in attempting to bring this case with *Edwards's* exception covering suspects who themselves initiate further discussion, California points to the following facts:

1. Collazo asked to talk to Officers' Destro and Rolen; they did not make the contact, he did.

2. Collazo's request to see them came some three hours after their initial departure.

3. In the interim, Collazo had been permitted

to speak privately and at length with his wife, a legal secretary.

4. Before confessing, Collazo was readvised of his *Miranda* rights and acknowledged to the police he had changed his mind and wanted to talk.

5. After he confessed, Collazo stated in response to questions from Destro that he was not acting because of any promises or threats made by the police.

California also points to various aspects of Collazo's personal background:

1. He was a mature 29 year old adult.

2. He had worked with the Drug Enforcement Administration as a undercover operative and as an informant.

3. He was personally and intimately familiar with the criminal justice system, having been arrested on previous occasions.

4. He was aware of his rights before the day of his apprehension.

In sum, California argues that the totality of the relevant circumstances and the characteristics of the confessor demonstrate that when Collazo asked to see Officers Destro and Rolen he was acting voluntarily, knowingly, and intelligently, not because of any previous compulsion. Relying on *Edwards* and *Connecticut v.*

Barrett, 479 U.S. 523 (1987), which permits a suspect to answer some questions while refusing to answer others, California concludes that his Mirandized confession was admissible in evidence.

[9] In making this argument California assumes that following a *Miranda* violation the appropriate question is the same as it is if no such violation has previously occurred--that is, did Collazo initiate the communication that led to the incriminating statements? We need not decide whether the state's view is correct, because even assuming for the sake of argument that it is, we find as explained below that Collazo's initiation of the communication leading to the second interrogation was the product of the coercive statements made by the police during the first, illegal interrogation.

[10] California's argument fails to appreciate the evident linkage between the coercion and the confession, and it fails to accord appropriate weight to the rules that govern this inquiry. To determine whether the initial coercion tainted both Collazo's request to see his interrogators as well as his alleged waiver, we apply the traditional test for deciding whether each was voluntary, asking whether each resulted from the exerise of Collazo's free will.

Ordinarily, the burden of proof in this regard falls upon the state, and it must be carried by a preponderance of the evidence. *Lego v. Twomey*, 404 U.S. 477, 489 (1972); *see also Connelly*, 479 U.S. at 168. ("Whenever the State bears the burden of proof in a motion to suppress a statement that the defendant claims was obtained in violation of our *Miranda* doctrine, the State need prove waiver only by a preponderance of the

evidence.")

However, "[a]s Justice White has explained, 'the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism.'" *Roberson*, 486 U.S. at 681 (quoting *Mosley*, 423 U.S. at 110, n.2 (White, J., concurring in result)). Thus, "if a suspect believes that he is not capable of undergoing such questioning without advice of counsel, then it is presumed that any subsequent waiver *that has come at the authorities' behest, and not at the suspect's own instigation*, is itself the product of the 'inherently compelling pressures' and not the purely voluntary choice of the suspect.") *Roberson*, 486 U.S. at 681 (emphasis added). Because we conclude that Officer Destro induced Collazo's purported waiver by initially insisting that Collazo cooperate, we believe *Roberson's* warning is highly pertinent.

The factors that are relevant to determining the effect of previous police coercion have been spelled out in *United States v. Patterson*, 812 F.2d 1188, 1192 (9th Cir. 1987). They are whether (1) there was a break in the stream of events sufficient to insulate the statement from the effect of the prior coercion, (2) it can be inferred that the coercive practices had a continuing effect that touched the subsequent statement, (3) the passage of time, a change in the location of the interrogation, or a change in the identity of the interrogators interrupted the effect of the coercion, and (4) the conditions that would have precluded the use of a first statement had been removed.

[11] The application of these factors to the facts of

the case at hand is similar to the task mandated by the Supreme Court in *Wong Sun*, 371 U.S. at 487-88. We must determine "whether, granting establishment of the primary illegality, the evidence to which . . . objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." (quoting Maguire, *Evidence of Guilt*, 221 (1959)). *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975), also provides considerable guidance.[9/]

> The question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on . . . a talismanic test. The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct are all relevant . . . . And

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9. The "primary illegality" in both *Wong Sun* and *Brown* was an illegal arrest. In the present case, the primary illegality was Officer Destro's attempt to coerce a *Miranda* waiver and a waiver of the privilege against self-incrimination. Inasmuch as this difference might affect *Wong Sun* and *Brown* as precedents, we find it to be insignificant.

> the burden of showing admissibility rests, of course, on the prosecution.

(citations omitted) (footnotes omitted).

[12] Our plenary review of the record in light of the relevant tests and the factors to be applied leads us to conclude that Collazo's alleged waiver and confession were not voluntary. Collazo testified he was scared, and that Officer Destro's threats are what cause him to change his mind and talk without counsel. The record amply supports his contentions. The day, subject matter, place of the interrogation, and interrogation team remained the same. Under the circumstances, the passage of only three hours is insignificant, even when coupled with Collazo's unreported discussion with his wife. California underscores Mrs. Collazo's occupation as a *legal* secretary, implying that her vocation somehow dissipates any taint that might have resulted from Officer Destro's warning. We find her occupation of no value in deciding this case. Collazo was entitled to the presence of an attorney, not a legal secretary. The trial judge remarked, "I am not going to assume that a legal secretary is in any position to give him any advice as to his legal rights," and observation with which we agree. Collazo's past experience working *with* law enforcement is at best a neutral factor; in fact, it may have made him unusually susceptible to Officer Destro's exhortation to cooperate. Moreover, the police did nothing to erase their transgression.

[13] Most importantly, however, a review of the tape and transcript of Collazo's alleged waiver and confession provide unmistakable evidence that no break in the causal chain or stream of events had occurred. Officer Rolen, Officer Destro's partner, opened the second exchange by

referring explicitly to their earlier discussion. Then, in readvising Collazo of his *Miranda* rights, Officer Rolen asked Collazo if he remembered "all the rights we advised you of earlier," evoking their earlier exchange. Officer Rolen then went through the rights using mostly the past tense, i.e., "you *had* the right to remain silent," "anything you *said* could be and would be used against you," "you *had* a right to have a lawyer present with you and if you *couldn't* afford one, one would be hired for you by the County of Santa Clara." (emphasis added). Then Officer Rolen said, "And then I asked you if you understood all those rights. Do you understand all that - Okay. Now understanding all those rights and after talking with your wife and so forth, have you changed your mind now and do you want to talk to us?" To this, Collazo said, "Yes."

Thus, Officer Rolen in Officer Destro's presence explicitly tied the two encounters together. Proof of this actual linkage in Collazo's mind is found in his immediate response to Officer Rolen's recapitulation. The exchange continued as follows:

> Q. Ok, ah, why don't you just go ahead and tell us what you want to tell us.
>
> A. Ah, (sigh) I want to have a discussion with you guys, ah, ah, ah what is the -- I'm going to tell you exactly what happened that day. Whatever, you know, I am going to tell you, ah, I know you know, my rights already. *Ah, I'm going to tell at the same time, ah, I would like to know what is the* (inaudible).
>
> Q. *What is going to happen to you?*
>
> A. Yes.

(emphasis added).

[14] One can only conclude from this exchange, and especially from Collazo's question about what would happen to him, that Officer Destro's threats about things "going worse" for Collazo if he sought a lawyer and did not cooperate were a primary motivating factor in his about-face and decision to talk without counsel. When first advised of his rights, Collazo had no questions for the police about his fate. He wanted a lawyer, presumably to counsel him on that issue. But when told abruptly that negative things would happen to him if he secured the services of legal counsel, he responded--albeit three hours later--with an inquiry that gives every appearance of having been generated by Officer Destro's pressure.

Officer Rolen then properly declined to make any promises to Collazo in response to his inquiry, but in so doing he pointed out that there are "two sides to every story," strongly implying, as did Officer Destro in their earlier encounter, that if Collazo cooperated it might mitigate his predicament.

[15] It is readily apparent from the historical facts that Collazo's "change of mind"--including his alleged *Miranda* waiver--was the direct product of the primary illegality in this case. Officer Destro's strategy was successful. Collazo caved in. There is nothing of substance to demonstrate otherwise. There was "no break in the stream of events . . . sufficient to insulate the statement from the effect of all that went before." *Clewis*, 386 U.S. at 710. Under the circumstances, Officer Rolen's readvice of rights and Collazo's alleged waiver thereof was an empty ceremony. Our analysis of this case confirms

the general observation of Chief Justice Rehnquist in *Michigan v. Harvey*, ___ U.S. ___, 110 S.Ct. 1176, 1180 (1990), that "suspects who assert the right to counsel are unlikely to waive that right voluntarily in subsequent interrogations."

This case is not an example of the situation envisioned in *Edwards* when the Court carved out an exception for those suspects who "initiate" further discussion. Although the words and even the actions that could normally be construed as "initiation" were present at the outset of the second encounter, an analysis of the substance of the entire transaction--rather than the isolated form of the second encounter--demonstrates that Collazo did not "initiate" further conversation as that term is used in *Edwards*, or in Justice Rehnquist's plurality opinion in *Bradshaw*, 462 U.S. at 1045 ("initiation" of a conversation by a suspect may be found based on an *unbadgered* desire for a generalized discussion about the investigation). As demonstrated, Collazo's words and actions in calling back the officers and in "waiving" his rights were nothing less than the *delayed product* of Officer Destro's admonitory adventure three hours previously, and hence were "initiated" by the police, not by Collazo. "[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing *only that he responded* to further police-initiated custodial interrogation even if he has been advised of his rights." *Bradshaw*, 462 U.S. at 1043 (emphasis added) (quoting *Edwards*, 451 U.S. at 484-85).

California does point to questions Collazo was asked after his confession and near the end of his encounter with the police regarding whether his statement was motivated by threats or promises. In context, his denial at

the time that threats or promises had anything to do with his decision to talk can only be seen as itself the predictable harvest of Officer Destro's strategy. Collazo was asked about this by the prosecutor during the motion to suppress, and he gave an explanation we find credible:

> Q. And you stated to them that they had not threatened you and they had--nor had they promised you anything; isn't that true?
>
> A. Yes.
>
> Q. And today, you are testifying that in fact, you did feel that they had threatened you?
>
> A. Yes, sir.
>
> Q. Okay. So at the end of that interview then, when you--the officers asked you if they had threatened you and you said no, you were lying to the officers; isn't that true?
>
> A. I don't know what that means, you know, to you, *but when you are in that kind of a situation, you have to say yes.*

(emphasis added).

This is an appropriate case for application of the exclusionary rule, the purpose of which is "'to deter--to compel respect for the constitutional guaranty in the only effectively available way--by removing the incentive to disregard it.'" *Brown v. Illinois*, 422 U.S. at 600 (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)). A more lenient approach would "simply invite the ingenious officer

to invent new stratagems to produce colorable waivers of the right to counsel." *United States v. Rodriguez-Gastelum*, 569 F.2d 482, 488 (9th Cir. 1978) (en banc) (Goodwin, J., concurring and dissenting).

V

Following submission of this case, the Supreme Court decided *Arizona v. Fulminante*, __ U.S. __, 111 S.Ct. 1246 (1991), holding that "harmless error analysis applies to coerced confessions." *Id.* at 1257. In light of this development, we requested the parties to the present case to file simultaneous briefs addressing the question of whether the use of Collazo's confession against him at trial, assuming it is found to have been involuntary, constituted harmless error. We have received the parties' briefs, and we now decide this issue.

The test for determining whether an error of Constitutional dimension was harmless comes from *Chapman v. California*, 386 U.S. 18 (1967). The *Chapman* test for excusing such error is whether the state has proved "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24. "To say that an error did not 'contribute' to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial. . . . To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Yates v. Evan*, No. 89-7691, 1991 U.S. LEXIS 2916 at 21 (May 28, 1991).

We approach the record in this case with an awareness of the impact of a confession in a criminal trial.

> A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." [*Bruton v. United States*, 391 U.S. 123, 139-40 (1968)]. While some statements by a defendant may concern isolated aspects of the crime or may be incriminating only when linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely on that evidence alone in reaching its decision.

Fulminante, 111 S. Ct. at 1257-58 (omission in original) (citations omitted). As Justice Kennedy observed, "the court conducting a harmless-error inquiry must appreciate the indelible impact a full confession may have on the trier of fact, as distinguished, for instance, from the impact of an isolated statement that incriminates the defendant only when connected with other evidence." *Fulminante*, 111 S. Ct. at 1266 (Kennedy, J., concurring).

An examination of Collazo's taped statement reveals that it is indeed a detailed confession to conspiracy to rob Douglas Metzger and to burglarize the Metzger home. At one point in the interrogation, when Collazo was pressed on his intent and his purpose in confronting Metzger, he

acknowledged his purpose was to rob Metzger of his "dope" and his money. This acknowledgment amounts to a complete confession to burglary, theft and robbery, and conspiring to commit those offenses. But, as California points out, Collazo's statement falls short of being a "confession" to murder. To constitute a confession, Collazo had to admit he was guilty of the crime of murder. California Jury Instructions Criminal ("CALJIC") 2.70 (1989 Revision). He made no such admission. In fact, the clear purpose of his statement was to assert he was innocent of murder because he fled the scene before his accomplice fired the fatal shot. It is apparent from his statement, however, that he was not conversant with either the felony murder rule or the vicarious liability that attaches under California law to co-conspirators. In California, a criminal conspirator is liable for "the natural and probable consequences of any act of a co-conspirator to further the object of the conspiracy, even though such act was not intended as a part of the original plan and even though he was not present at the time of the commission of such act." CALJIC 6.11 (1989 Revision).

Thus, Collazo's statement was tantamount to a confession to murder even though he may not have realized it at the time. In any event, the precise label placed on Collazo's statement
vis-a-vis the murder allegation is less important than what he said, and the probable impact of his statements on the jury.

California, in its supplemental brief, addresses the harmless error issue as follows:

> Appellant's defense [that he had withdrawn from the conspiracy before the killing] was

> inherently incredible and defies the application of logic. Appellant purportedly abandoned the conspiracy but yet continued to associate with the coconspirators only hours later. Furthermore, he went to the Metzger residence either personally armed or with knowledge that his newly-found coconspirator was armed with a firearm. If his true intent was merely to speak with the victim, Young's involvement and the display of a firearm conflicts with this purpose. The critical evidence used to establish appellant's culpability was not the challenged statement to the police. It was, instead, the prosecution's independent evidence of the conspiracy, the eyewitness testimony relating to appellant's actions at the Metzger residence, and the coconspirators' statement to appellant's wife that appellant went to the Metzger home to commit a robbery. Therefore, the admission of appellant's statements was harmless beyond a reasonable doubt.

California may be correct that Collazo's defense was "incredible," but we cannot agree that the "critical evidence used to establish appellant's culpability was not the challenged statement to the police." The prosecutor repeatedly punctuated his cross-examination of Collazo with references to the statement, and he pummeled Collazo with excerpts from it that were inconsistent with his statements at trial. The prosecutor relied extensively on the taped interview in attacking Collazo's testimony that he had abandoned all criminal intent before appearing at Douglas Metzger's house on the evening that Metzger was killed. Collazo testified that it was during an earlier visit to the house with Ricky Laureano that he

began to change his mind. One passage from the cross-examination of Collazo suffices to illustrate this point:

> Q When you talked to the police, I think you testified on direct that you lied to them in several areas; is that correct?
>
> A Yes, sir.
>
> Q And when you were interviewed by the police at the end of the interview, you swore to them that everything you said to them was true, didn't you?
>
> A Yes, more or less was the truth. The only thing that I was holding was the involvement of Ricky. They have information on Ricky.
>
> Q Well, at the end of the interview, did you tell Sergeants Rolen and Destro, "I swear to God this is more or less the truth?"
>
> A No, sir.
>
> Q You told them it was the truth, didn't you?
>
> A Yes, sir.
> Q And at the beginning of that interview, you told them, "I am going to tell you exactly what happened, isn't that correct?
>
> A I think so, yes.
>
> Q And at the time you told them this, you knew that they had arrested you for murder, did

you not?

A Yes, sir.

Q And you didn't tell them that you and Ricky had been there earlier, did you?

A No, sir.

Q And they asked you about whether or not you were there earlier, didn't they?

A Yes, sir.

Q And you testified here in court that the reason that you did not tell them about Ricky and you being there earlier was to protect Ricky?

A Yes.

Q At the same time on that tape, didn't--strike that, at the same time during that interview, didn't you tell the police officers that you had been with Ricky earlier that day?

A Yes, sir.

Q And you gave them Ricky's name?

A Yes, sir.

Moreover, the prosecutor relied heavily in closing argument on Collazo's taped statement. He did so in three respects. First, he used it to cement his own case:

"I would submit to you, ladies and gentlemen, that there is more than sufficient evidence to find the defendant guilty of murder in the first degree. . . . You can base it [among other things] upon the statements to the police on the tape." Second, the prosecutor used the statement to attack Collazo's credibility as a witness: "And remember, remember Mr. Collazo's testimony from the witness stand and how that differs from the taped statement. In the tape, there is nothing about the door being opened and Doug Metzger lunging over him to get to the black man." Third, he used the statement to impugn directly Collazo's defense of abandonment. "The only way you could follow [defense counsel's] line of argument is if you wipe out all the circumstances behind this crime, if you wipe out this taped statement and you go strictly and purely upon his testimony on the stand. . . ." The record is replete with similar examples of the effective use of the taped statement during both cross-examination and closing argument.

[17] It is impossible to conclude from the foregoing as well as from the rest of the evidentiary record that Collazo's coerced statement did not contribute to his conviction. The taped statement as it was used by the prosecutor was clearly not "unimportant in relation to everything else the jury considered on the issue." *Yates v. Evatt*, 1991 U.S. Lexis 2916. Thus, California has failed to sustain its burden of showing beyond a reasonable doubt that the admission in evidence of Collazo's statement and its use during the trial was harmless error.

VI

Neither Collazo's request to talk to his interrogators, nor his alleged *Miranda* waiver, nor his custodial

confession were voluntary, as that term applies either to the conduct of the police, or to Collazo's subjective reaction to police overreaching. To the extent that the state trial court's conclusions on these issues are inconsistent with this evaluation, we respectfully reject them as being without foundation in the record. Furthermore, we conclude the error in question was not harmless.

We reverse the district court's denial of the petition for writ of habeas corpus. The case is remanded to the district court to issue the writ and to determine a reasonable time in which the State of California shall retry the petitioner without using his taped statement, or release him.

REVERSED and REMANDED.

KOZINSKI, Circuit Judge, concurring:

There is much in both of the principal opinions with which I agree. The dissent clearly has the better of the argument on the purely factual question whether Collazo's confession was coerced. Were we deciding only that issue, I would have no difficulty concluding that Collazo knew exactly what he was doing when he asked to talk to the police the second time.

I come down on the side of the majority, however, because the Supreme Court has told us that voluntariness is not merely a fact-bound question whether this particular suspect's confession is the product of coercion, but also a legal question about whether the techniques the police

used were tolerable. As the Court noted in *Miller v. Fenton*, 474 U.S. 104, 116 (1985), "the admissibility of a confession turns as much on whether the techniques for extracting the statement, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne." The question before us, then, is whether the technique used here risks overcoming the will of the run-of-the-mill suspect, even if it did not overcome the will of this particular suspect.

So phrased, the question is capable of only one answer. As the Supreme Court said in *Edwards* the police may not undercut the prophylactic rule of *Miranda* by refusing to accept a suspect's assertion of the right to counsel. *See Edwards v. Arizona*, 451 U.S. 477, 484 (1981); *see also Minnick v. Mississippi*, 111 S. Ct. 486, 490-91 (1991). The *Edwards-Minnick* line of cases "is 'designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.'" *McNeil v. Wisconsin*, 59 U.S.L.W. 4636, 4638 (June 13, 1991) (quoting *Michigan v. Harvey*, 494 U.S. 344, 350 (1990); *see also Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983). We can't allow police to advise suspects that they will pay dearly for taking advantage of their right to counsel, precisely because some suspects will succumb to the pressure, even if this suspect did not.

This case is difficult only because *Edwards* allows an exception where the second round of questioning is initiated by the suspect. *See Edwards*, 451 U.S. at 484-85. The dissent does a masterful job of showing that the *Edwards* exception might apply to Collazo because he initiated the second interrogation. In my view, however,

the police forfeit the benefit of the *Edwards* exception once they use the type of pressure tactics demonstrated in this record. Because *Edwards* is designed to prevent police from badgering suspects into giving up their right to counsel, the narrow exception to *Edwards* cannot apply in a case where the police actually engaged in badgering. If police want to keep the *Edwards* escape hatch open, they must cease their interrogation as soon as the suspect asserts his right to counsel, and then hope he changes his mind on his own. Any other rule would invite police misconduct and enmesh the courts in the type of metaphysical unscrambling of which this case is a perfect example.

GOODWIN, Circuit Judge, (dissenting separately):

This case is en banc because a majority of our active judges believed that an important Sixth Amendment question, the right to counsel, may have been incorrectly dealt with by all the other courts, including our original panel, that have examined the question.

In the state court system the primary focus appears to have been on the question of Fifth Amendment voluntariness. The most troublesome question now is whether Collazo called the officers back on his own motion, or because he felt "pressured" by Officer Destro to do so. In this connection, the majority's footnotes carry most of the burden.

For example, footnote 2 says that California admits that "pressuring" is an appropriate characterization of Officer Destro's tactics. I agree, but that leads to the next footnote.

footnote.

Footnote 3 sets up the state trial court's merger of the Fifth and Sixth amendments and helps to explain the resulting confusion. The state court listened to the tapes, found the confession "voluntary beyond any reasonable doubt," and then disposed of the right-to-counsel issue with the throw-away line that there was "no taint whatsoever to his ultimate statement."

Footnote 8 takes up the heart of the matter: Did Destro's "pressuring" cause Collazo to change his mind about wanting a lawyer? That is what this case is about.

Footnote 5 answers the question left open in footnote 8. It holds that the pressure mentioned in footnote 2 carries over and taints Collazo's statements.

Reasonable minds can and do differ about when a federal court should say as a matter of law that the state courts were wrong in their voluntariness analysis. As far back as *Jackson v. Denno*, 378 U.S. 368 (1964), in the separate opinion of Mr. Justice Black, we find the doctrine emerging that the federal courts should "reexamine the facts to be certain that there has been no constitutional violation, and our inquiry . . . cannot be cut off by fact findings at the trial level." 378 U.S. 368 at 408.

Reasonable minds can and do differ about whether a federal court should say as a matter of law that the state courts were wrong in applying *Edwards v. Arizona*, 451 U.S. 477 (1981), to this case. The state trial court and reviewing courts found in effect that Collazo initiated the second conversation and was not coerced into giving

It is not clear, however, that the state courts focused on this question. The majority finds that the state courts were wrong, and that Destro's remark tainted Collazo's later conversations. The case boils down to the question of "taint."

I have come to the conclusion that in this case, the state trial court probably reached the right result for the wrong reason. Collazo knowingly called back the officers, not because he was "menaced" or coerced, but because he apparently thought he could improve his situation by appearing to cooperate. I doubt that Collazo was brooding for three hours about how much worse off he would be with a lawyer than without one. Collazo is an informer who made the perpetrator's common mistake of thinking he could outsmart the police by telling them his side of the story.

I am content to take his taped confession at face value. There is no possibility in this case of an innocent man spending time in jail because of the overriding of his will by the comment of Officer Destro. Accordingly, I would vote to affirm the denial of the writ.

O'SCANNLAIN, Circuit Judge, with whom BEEZER and NOONAN, Circuit Judges join, dissenting:

To paraphrase the great Bard of Avon, "[t]he [majority] doth protest too much, methinks." W. Shakespeare, *Hamlet*, III, ii. In a noble attempt to vindicate important legal principles, my colleagues have misinterpreted and exaggerated the essential and

vindicate important legal principles, my colleagues have misinterpreted and exaggerated the essential and dispositive facts of this case. More importantly, they have unjustifiably expanded the prophylactic rules that govern the waiver of an accused's constitutional rights to legal assistance and against self-incrimination. I therefore respectfully dissent.

I

A

In *Edwards v. Arizona*, 451 U.S. 477 (1981), the Supreme Court held that "an accused . . . , having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges, or conversations with the police.*" *Id.* at 484-85 (emphasis added). Elaborating upon the importance of this italicized language, which my colleagues now excise from the Court's holding, the Court wrote:

> In concluding that the fruits of [a second] interrogation initiated by the police on January 20 could not be used against Edwards, we do not hold or imply that Edwards was powerless to countermand his election [to remain silent and to consult an attorney] or that the authorities could in no event use any incriminating statements made by Edwards prior to his having access to counsel. *Had Edwards initiated the meeting on January 20, nothing in the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered*

> *statements and using them against him at the trial.* The Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodial interrogation. Absent such interrogation, there would have been no infringement of the right that Edwards invoked and there would be no occasion to determine whether there had been a valid waiver. *Rhode Island v. Innis*, [446 U.S. 291, 298 n.2 (1980)], makes this sufficiently clear.

Id. at 485-86 (emphasis added).

Two years after *Edwards*, in *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), a plurality of the Court announced a two-part test by which to gauge the admissibility of a confession offered by a suspect after his invocation of the right to counsel. The confession is admissible, the Court held, if (a) the suspect initiates the discussion that leads to it and (b) the totality of the circumstances reveals that the purported waiver is both voluntary and intelligent. *Id.* at 1044-46 (plurality opinion); *see also id.* at 1048-50 (Powell, J., concurring in the judgment).

More recently, in *Arizona v. Roberson*, 486 U.S. 675 (1988), in language that the majority surprisingly quotes and emphasizes, the Supreme Court held that in the wake of a request for counsel "it is presumed that any subsequent waiver *that has come at the authorities' behest, and not at the suspect's own instigation*, is itself the product of the 'inherently compelling pressures' and not the purely voluntary choice of the suspect." *Id.* at 681, *quoted ante* at 8890 (with same emphasis added). Mirroring the more explicit language of *Edwards* and *Bradshaw*, *Roberson*'s tacit suggestion is that a subsequent waiver "at the

suspect's own instigation" is not subject to such presumption.

Similarly, in *Minnick v. Mississippi*, 111 S. Ct. 486 (1990), a recent decision wholly neglected by my colleagues, the Supreme Court held that when an accused requests counsel, "interrogation must cease, and *officials* may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." *Id.* at 491 (emphasis added). Like *Bradshaw* and *Roberson*, *Minnick* is a conscious and careful echo of *Edwards*. Writing for the Court in *Minnick*, Justice Kennedy repeatedly stressed that the prophylactic protection of these several rulings only extends to situations involving "police-initiated questioning." *Id.*; *see also id.* ("a fair reading of *Edwards* and subsequent cases demonstrates that we have interpreted the rule to bar *police-initiated* interrogation unless the accused has counsel with him at the time of questioning") (emphasis added); *id.* at 489 ("'a valid waiver of th[e] right [to have counsel present during questioning] cannot be established by showing only that [the accused] responded to further *police-initiated* custodial interrogation . . .'") (quoting *Edwards*, 451 U.S. at 484) (emphasis added).

Indeed, the *Minnick* Court went out of its way to explain that "*Edwards* does not foreclose finding a waiver of Fifth Amendment protections after counsel has been requested, provided that *the accused* has initiated the conversation or discussions with the authorities; but that is not the case before us." *Id.* at 492 (emphasis added). I respectfully submit that what was not before the Supreme Court in *Minnick* is before this court today.

B

Given that the Supreme Court itself has denied that *Edwards* compels the majority's holding, it is curious indeed for the majority to suggest that the officers' conduct represented a "textbook violation of *Edwards v. Arizona*." *Ante* at 8883.[1/] Even the majority admits that Collazo initiated the conversation that immediately led to his confession of guilt:

> Collazo requested to talk to a lawyer. Instead of respecting his request, however, Officer Destro (Officer Rolen's partner) attempted to pressure him into dispensing with counsel and talking to them about the homicide. . . .
>
> The police then departed. . . .

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1. In Part III of its opinion, the majority discusses Collazo's initial conversation with the two officers. In Part IV, the majority discusses the second conversation, which Collazo himself initiated and during which he confessed. Significantly, the majority claims that a "textbook violation" of *Edwards* occurred during the *first* conversation, but that observation is a straw man in the context of this appeal because Collazo did not confess at that time. The majority does not contend that any violation of *Edwards* -- textbook or otherwise -- occurred during the second conversation. Rather, it creatively construes the facts to avoid confronting the reality that, because Collazo initiated the second conversation, *Edwards* and its progeny suggest that his confession may be admitted. *See infra* Part I-C.

> Collazo was then permitted to call and see his wife, a legal secretary. She came to the police station and had a lengthy discussion with him, the substance of which is unknown. Some three hours after the officers' departure, Collazo contacted a sergeant and asked, "Where are the investigators?" The sergeant correctly construed this as a request to talk to them, and they were so notified and returned to the station. Collazo was again advised of his *Miranda* rights, and indicated he had changed his mind and was now willing to talk. He then essentially confessed to his non[-]shooting role in the crimes for which he had been charged and arrested.

Ante at 8875-76 (footnote omitted).

Under a plain reading of these facts and the *Bradshaw* and *Edwards* rules, Collazo's confession was both voluntary and legally admissible in the case against him. After a three-hour hiatus, during which time he had the opportunity to (and did) have "a lengthy discussion" with a trusted confidante, Collazo actively sought out the police officers who were investigating the Metzger homicide.[2/] The officers, who had long since left the

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2. The majority is undoubtedly correct in concluding that the right to have counsel present during an interrogation contemplates more than the assistance of a legal secretary -- especially when the collective judgment of the accused and the secretary may be clouded by their having a spousal (or other non-legal) relationship. *See ante* at 8891-92. That observation, however, would only be relevant if the issue before us

police station, were then summoned back upon his request. Once again, and notably without making any impermissible suggestions this time, the officers advised Collazo of his *Miranda* rights. Only after affirmatively acknowledging that he understood those rights *four times* and that he voluntarily had changed his mind, did Collazo confess.[3/]

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were whether the police had honored Collazo's request for an attorney. Instead, the issue before us is whether Collazo voluntarily waived his rights and confessed his crime. "The voluntary or involuntary character of a confession is determined by a conclusion as to whether the accused, at the time he confesses, is in possession of 'mental freedom' to confess to or deny a suspected participation in a crime." *Lyons v. Oklahoma*, 322 U.S. 596, 602 (1944). The fact that Collazo "had a lengthy discussion" with a trusted confidante immediately before admitting his guilt -- regardless of that confidante's legal know-how -- is supporting evidence of such "mental freedom."

3. In a strained attempt to demonstrate evidence of coercion, the majority points out that Officer Rolen "opened the second exchange by referring explicitly to the[ ] earlier discussion" and then did not cleanly readvise Collazo of his *Miranda* rights because he "went through the rights using mostly the past tense. . . ." *Ante* at 8892. The majority, however, accurately describes the discussion immediately preceding the confession as follows:

> Then Officer Rolen said, "And then I asked you if you understood all those rights. Do you

No one disputes that the officers' conduct during the *initial* conversation was improper and reprehensible. The issue, however, is whether that improper conduct *produced* Collazo's later confession. As the Supreme Court opined in *Rhode Island v. Innis*, 446 U.S. 291 (1980):

> [I]t may be said . . . that the [petitioner] was subjected to "subtle compulsion." But that is not the end of the inquiry. It must also be established that a suspect's incriminating response was *the product* of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response. This was not established in the present case.

> understand all that -- Okay. Now understanding all those rights and after talking with your wife and so forth, have you changed your mind now and do you want to talk to us?" To this, Collazo said, "Yes."

Ante at 8892. In my view, there is nothing "passive" about Collazo's waiver here and nothing peculiar about readvising a suspect of his rights while referring to a previous advisement in the past tense. Indeed, the tape of Collazo's confession reveals that during the second conversation the officers were extraordinarily patient and careful, asking and ensuring that the accused understood his rights four times before allowing him to proceed.

Id. at 303 (footnote omitted and emphasis added). On the contrary, California carried its burden at the trial level of proving by a preponderance of the evidence that Collazo's waiver and confession were voluntary. *See Colorado v. Connelly*, 479 U.S. 157, 168 (1986) ("Whenever the State bears the burden of proof in a motion to suppress a statement that the defendant claims was obtained in violation of our *Miranda* doctrine, the State need prove waiver only by a preponderance of the evidence."); *see generally Lego v. Twomey*, 404 U.S. 477 (1972). In fact, as the majority points out, "the trial court found Collazo's confession 'voluntary beyond a reasonable doubt,' and that there was 'no taint whatsoever to his ultimate statement.'" *Ante* at 8877 n.3 (quoting trial transcript).

Even if the state had not met its burden, however, the "totality of the circumstances" plainly reveals that Collazo voluntarily initiated the discussion during which he confessed and, further, that he initiated that discussion precisely in order to confess. *See Colorado v. Spring*, 479 U.S. 564, 573 (1987) ("'Only if the "totality of the circumstances surrounding the interrogation" reveal[s] both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.'") (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (quoting *Fare v. Michael C.*, 442 U.S. 707, 725 (1979))). As a prior panel of this court observed:

> Collazo had a prior criminal history, and was experienced in the routine of police interrogation. He was a paid informant of the DEA. There was a lapse of approximately three hours between the first interrogation session and

> Collazo's subsequent confession. Collazo conferred with his wife in the interim. Finally, at the time of his confession, Collazo stated that he was not acting under pressure of any promise or threat.

Collazo v. Estelle, 898 F.2d 87, 89 (9th Cir. 1989), *reh'g en banc granted*, *id.* at 91. Collazo's familiarity with the legal process, his ability to consult his wife, his affirmation that he understood and yet still wished to waive his rights, the passage of a considerable period of time, and the complete absence of any evidence to suggest that he was acting under duress -- when weighed together -- demonstrate "a break in the chain of events sufficient to insulate the statement from all that went on before." *United States v. Patterson*, 812 F.2d 1188, 1192 (9th Cir. 1987) (citing *Clewis v. Texas*, 386 U.S. 707, 710 (1967)), *cert. denied*, 485 U.S. 922 (1988).[4/]

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4. The *Patterson* court listed four factors that "have been identified [by the Supreme Court] as relevant to the issue of whether a statement *made after an involuntary statement* is voluntary." 812 F.2d at 1192 (emphasis added). The majority applies these four factors and concludes that "Collazo's alleged waiver and confession were not voluntary." *Ante* at 8891; *see also ante* at 8890-93. *Patterson*, however, is not directly on point: Collazo did not make any coerced, self-incriminating statements during his initial conversation with the police.

Nonetheless, I agree that the *Patterson* factors can inform our analysis here. I disagree, however, with the majority's conclusions under that analysis -- particularly

To borrow from the language of torts, a preponderance of the evidence indicates that Collazo's own free will was the "supervening cause" of his confession. Under such circumstances and where the accused, rather than the police, initiates the relevant discussion, *Edwards* and its progeny clearly indicate that a confession is properly admissible. Virtually all other circuits that have addressed this question have so concluded, and a district court within this circuit has agreed. *See United States v. Velasquez*, 885 F.2d 1076, 1083-89 (3d Cir. 1989) (suspect who initiated further discussion and confessed after first invoking *Miranda* rights effectively waived those rights), *cert. denied*, 110 S. Ct. 1321 (1990); *Plazinich v. Lynaugh*, 843 F.2d 836 (5th Cir. 1988) (same), *cert. denied*, 488 U.S. 1031 (1989); *United States v. Comosona*, 848 F.2d 1110, 1112-13 (10th Cir.

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its conclusions that "the passage of only three hours is insignificant" and that Collazo's previous experience with law enforcement "is at best a neutral factor." *Ante* at 8891-92. In *Robinson v. Percy*, 738 F.2d 214 (7th Cir. 1984), the Seventh Circuit found a valid waiver under the totality of the circumstances even though "only a couple of minutes elapsed between the [officer's] illegal questioning and [the accused's] own confession." *Id.* at 221. Similarly, in *United States v. Velasquez*, 885 F.2d 1076 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 1321 (1990), the Third Circuit found a valid waiver where the accused, who had requested counsel only thirty minutes before, initiated further discussions and confessed only moments after a DEA agent lied to her in an effort to induce her to speak. The facts in neither of these cases are as compelling as the facts here.

1988) (same); *Fike v. James*, 833 F.2d 1503 (11th Cir. 1987) (same); *Robinson v. Percy*, 738 F.2d 214, 221 (7th Cir. 1984) (same); *Fetterly v. Paskett*, 744 F. Supp. 966, 970-71 (D. Idaho 1990) (same); *cf. United States v. Gomez*, 927 F.2d 1530, 1539 (11th Cir. 1991).

C

The majority is only able to avoid this conclusion through a combination of dubious factfinding and wordplay that purportedly permits the court to say that Collazo did not really "initiate" the discussion that led to his confession.

First, the majority claims that there is an "evident linkage between the [initial] coercion and the [subsequent] confession." *Ante* at 8889. In the majority's words, "we find . . . that Collazo'sinitiation of the communication leading to the second interrogation was the product of the coercive statements made by the police during the first, illegal interrogation." *Ante* at 8889. Appearing as it does for the first time in the long history of this case in the latter pages of the majority's opinion, this purely factual finding is hardly believable. Indeed, in four previous decisions in this very case, the state trial and appellate courts, the district court, and a prior panel of this court all expressly found that there was no linkage -- evident or otherwise -- between the officers' initial comments and Collazo's later confession.[5/] Again, as the majority

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5. Some have argued that under such circumstances as these, federal courts should apply the holding of *Stone v. Powell*, 428 U.S. 465 (1976), to

concedes, the trial court found that Collazo's confession was "voluntary beyond a reasonable doubt." *See ante* at 8877 n.3; *see also Sumner v. Mata*, 449 U.S. 539, 546-47 (1981) (in habeas proceedings, the factual findings of state trial and appellate courts are presumed correct if fairly supported by the record). Indeed, as the state points out, Collazo himself repeatedly affirmed at the time of his confession that his waiver was the product of his own free will, and the trial court agreed. My colleagues, however, dispense with that finding and substitute their own judgment, determining on the basis of a cold record that those affirmations are not credible but that Collazo's subsequent, counsel-guided testimony at the suppression hearing is. *See ante* at 8895. Credibility determinations, though, are not the province of this court. We must accept those determinations as they appear in the record, and the majority is unable to demonstrate where in the record there is any affirmative evidence of their alleged "evident linkage." The facts simply do not support the finding.[6/]

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foreclose the collateral review of a state conviction altogether. *See Duckworth v. Eagan*, 492 U.S. 195, ___, 109 S.Ct. 2875, 2881-85 (1989) (O'Connor, J., with whom Scalia, J., joins, concurring).

. 6. The officers' comments during the first discussion were "coercive," but that does not mean that they necessarily resulted in "coercion." Collazo did not confess during the initial conversation. To link his later confession to the officers' earlier coercive comments requires some independent evidence of actual coercion. I submit that there is none and that the majority has not shown otherwise. The majority places critical weight

Moreover, the majority's characterization of the second discussion as a "second interrogation" is itself inappropriate: "'Interrogation,' as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." *Innis*, 446 U.S. at 300 (footnote omitted). "By custodial interrogation, we mean questioning *initiated by law enforcement officers* after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (emphasis added). Collazo initiated the second discussion and was not subjected to substantial pressures during that discussion before he actually confessed. Under similar circumstances, this court has held that a discussion may not be characterized as an "interrogation" for purposes of *Miranda*. *See Shedelbower v. Estelle*, 885 F.2d 570, 573 (9th Cir. 1989), *cert. denied*, 59 U.S.L.W. 3562 (1991); *United States v. Thierman*, 678 F.2d 1331, 1334-35 (9th Cir. 1982); *see also United States ex rel. Church v. DeRobertis*, 771 F.2d 1015, 1017-20 (7th Cir. 1985); *Robinson v. Percy*, 738 F.2d at 218-19. Under similar circumstances, the Supreme Court has also

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on Collazo's concern, during the second conversation, with what might happen to him. *See ante* at 8893. It seems wholly natural to me, however, for someone faced with such serious criminal charges to ask a police officer what fate may await him; the question is in no way indicative of an overpowered will. Nor do I regard the question as in any way referential to the prior conversation. The majority's conclusion that Collazo's query ineluctably and unmistakably demonstrates "actual linkage" escapes me. *Ante* at 8893.

suggested that *Miranda* rights may not even be implicated. *See Innis*, 446 U.S. at 298 n. 2; *Edwards*, 451 U.S. at 485-86; *see also Arizona v. Mauro*, 481 U.S. 520 (1987).

By declaring the existence of an "evident linkage" between the two discussions, the majority seeks to do with the facts what it clearly cannot do with the law: escape the unmistakable implication of *Edwards, Bradshaw, Roberson, Innis,* and *Minnick* that when the accused initiates the conversation, he may thereby render harmless prior police improprieties and render admissible subsequent incriminating statements. By holding, as a factual matter, that Collazo was acting under the undue influence of the officers' earlier comments when he later requested to speak with them, the majority concludes that Collazo did not actually "initiate" the second conversation at all but that, in fact, the police did. *Ante* at 8894. This cannot be believed, and as a result, neither can the court's holding that Collazo's confession was coerced.

This, then, is the critical flaw in the majority's analysis: Part III of the court's opinion presents a compelling but largely irrelevant survey of our *Miranda* jurisprudence and its underlying policy rationales only to conclude, in dicta, that the conduct of the police during the *first* conversation was not "compatible with a system of justice that does not permit police coercion" and typifies behavior that "offends due process as guaranteed by the Fourteenth Amendment." *Ante* at 8880, 8887. Part IV then attempts to resuscitate Part III, which is otherwise entirely dicta, by finding the all-important "evident linkage": the ethereal thread of coercion that ties the two conversations -- and the two parts of the majority's analysis -- together. The structure of the argument is inherently seductive. Surely no one disagrees with Part III

and its broad affirmations of an accused's rights, but properly understood, Part III has no bearing on the specific facts or question before us.

In short, because there was no appreciable foul play associated with the incriminating second conversation and because Collazo himself initiated that conversation in order to confess, the majority's holding cannot stand unless one is able to impute the impropriety that occurred during the first conversation into the second one as well. This requires a finding of not one, but two involuntary acts on Collazo's part. First, one must find that Collazo's request to speak with the officers -- after the three-hour hiatus and after the lengthy discussion with his wife -- was itself coerced, and then one must find that his subsequent confession was also coerced. The facts support neither finding. Collazo affirmatively initiated the second conversation and voluntarily admitted his guilt.[7]

D

If the majority's misreading of the facts were my only

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7. Having concluded that Collazo's waiver and subsequent confession were voluntary, I need not address the question of harmless error: the admission of a voluntary confession is by definition not error, and where there is no error, there can be no harmful error. *But see Arizona v. Fulminante*, 111 S.Ct. 1246, 1266-67 (1991) (Kennedy, J., concurring in the judgment) (concluding that confession was not coerced but, reaching harmless-error issue in light of majority's contrary holding, concluding that its admission was not harmless error).

complaint, this would be a briefer dissent. A view of police coercion as expansive as the majority's, however, has greater ramifications. If allowed to stand, the majority's holding will unjustifiably extend the current reach of *Miranda's* prophylactic protections. *See Connelly*, 479 U.S. at 166 (cautioning against "expanding 'currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries'") (quoting *Lego*, 404 U.S. at 488-89).

The "unless" clause in the *Edwards* holding, the qualification in the *Roberson* holding, the very essence of the *Bradshaw* and *Innis* holdings, and the careful caveat in *Minnick* -- which all suggest that *suspect*-initiated discussions may produce admissible confessions in the wake of police improprieties -- are at risk of becoming dead letters within this circuit. If a court can find upon these facts that the accused did not "initiate" the relevant discussion and did not voluntarily confess thereafter, then one wonders under what conditions a confession in the wake of prior police misconduct will ever be admissible in court. In short, the majority's holding goes a long way toward establishing the proposition that police misconduct creates a per se violation of *Miranda* that subsequent voluntary acts of the accused can never render harmless. *See United States v. Anderson*, 929 F.2d 96, 99 (2d Cir. 1991) ("the application of a *per se* rule is inappropriate"). Because *Miranda* is a prophylactic rule -- and not a constitutional right -- such a proposition of law has no rationale to recommend it. *See ante* at 8885 (acknowledging that "*Miranda* 'rights' are 'not themselves rights protected by the Constitution'") (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)); *see also Roberson*, 486 U.S. at 688-93 (Kennedy, J., dissenting)).

II

Courts must be wary of exaggerating what are properly recognized as contemptible improprieties into grandiose visions of injustice. The temptation to entertain such visions is especially great in cases that pit lonely criminal defendants against the police and prosecutorial powers of their state governments. The danger in succumbing to such temptation is that rules designed to secure the integrity of the legal process can gradually take the form of escape valves whose only notable effect is to provide safe haven for indisputably guilty persons. *Cf. Fulminante*, 111 S. Ct. at 1264 (holding that even the admission of a coerced confession may be harmless error and noting that "'the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence'") (quoting *Delaware v. Van Ardsdall*, 475 U.S. 673, 681 (1986)); *see also Robinson v. Borg*, 918 F.2d at 1394 (Trott, J., dissenting) (warning against the dangers of expansive judicial applications of the *Miranda* rules and urging the judiciary "to monitor carefully the costs of these rules as they are applied to the cases that come before us").

In my view, that is precisely what has happened in this case and what could happen to this court's *Miranda* jurisprudence generally. Through a dramatic envoy, our thoughtful bard once warned:

> We must not make a scarecrow of the law, Setting it up to fear the birds of prey, And let it keep one shape till custom make it Their perch, and not their terror.

W. Shakespeare, *Measure for Measure*, II, i. The majority has rallied behind such a straw man here, and I therefore earnestly hope that the tenure of today's ruling as the law of this circuit will be short-lived.

APPENDIX B

Dennis Rosa COLLAZO,
Petitioner-Appellant,

v.

Wayne ESTELLE, Warden, California Mens Colony, Respondent-Appellee

No. 88-2443.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 8, 1989.

Decided Sept. 1, 1989.

As Amended March 14, 1990.

As Amended May 8, 1990.

Rehearing En Banc Ordered
May 30, 1990.

State prisoner's petition for writ of habeas corpus was denied by the United States District Court for the Northern District of California, Robert P. Aguilar, J., and prisoner appealed. The Court of Appeals, Farris, Circuit Judge, held that defendant's confession was not product of prior police impropriety in telling defendant, after he requested to confer with counsel, that things "might be worse" for him if he did not cooperate.

Affirmed.

Trott, Circuit Judge, filed a dissenting opinion.

1. **Criminal Law 1158(4)**

Court of Appeals had independent duty to subject

question of voluntariness of a defendant's confession to plenary federal review.

2. **Criminal Law 531(1)**

The Government has the burden of proving that a defendant's decision to confess was made independently of any police coercion.

3. **Criminal Law 517.2(1, 2), 519(1)**

Police conduct in telling defendant, after he requested to confer with counsel, that things "might be worse" for him if he did not cooperate was improper and constituted interrogation, but confession three hours later followed voluntary waiver of Fifth Amendment rights and was not a "product" of earlier impropriety, where defendant was experienced in routine of police interrogation, defendant had conferred with his wife in interim between the impropriety and the confession, and, at time of confession, defendant stated that he was not acting under pressure of any promise or threat. U.S.C.A. Const.Amend. 5.

William D. Farber, San Rafael, Cal., for petitioner-appellant.

John K. Van de Kamp, Atty. Gen., for the State of Cal., Steve White and John H. Sugiyama, Asst. Attys. Gen., and Martin S. Kaye and Aileen Bunney, Deputy Attys. Gen., San Francisco, Cal., for respondent-appellee.

Appeal from the United States District Court for the Northern District of California.

Before FARRIS, THOMPSON and TROTT, Circuit Judges.

FARRIS, Circuit Judge:

Dennis Collazo appeals from the denial of his petition for a writ of habeas corpus. He argues that incriminating statements which he made while in custody should have been excluded at trial because they were the product of police coercion. We affirm.

On September 27, 1982, Collazo was arrested in connection with a fatal shooting and was taken to an interrogation room at the San Jose police station. After two police officers advised him of his rights under *Miranda*, Collazo requested to confer with counsel. The police twice told Collazo that things "might be worse" for him if he did not cooperate, and that he might be charged with murder. The police then promptly terminated the interrogation. Three hours later, after speaking with his wife, Collazo initiated further discussions with the police and confessed to his role in the shooting. Collazo's confession was admitted into evidence over his objection at trial. He was convicted of felony murder, burglary, and conspiracy, and was sentenced to 26 years imprisonment.

In *Colorado v. Spring*, 479 U.S. 564, 573, 107 S.Ct. 851, 857, 93 L.Ed.2d 954 (1987), the Supreme Court stated the following test for determining whether a suspect's *Miranda* rights have been validly waived:

> First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.

> Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.

The *Spring* test has been satisfied. Although the police officers' comments were no doubt improper, the state court found, after conducting a full evidentiary hearing, that Collazo's subsequent initiation of talks with the police was not the "product" of the earlier impropriety. Our own review of the record convinces us that the state court was correct.

[1-3] We have an independent duty to subject the question of the voluntariness of the defendant's confession to "plenary federal review." *See Miller v. Fenton*, 474 U.S. 104, 115,106 S.Ct. 445, 452, 88 L.Ed.2d 405 (1985). The Government had the burden of proving that the defendant's decision to confess was made independently of any police coercion. We have carefully reviewed the evidence and we hold that the Government has met that burden and has shown that the defendant's confession was voluntary.

Collazo had a prior criminal history, and was experienced in the routine of police interrogation. He was a paid informant of the DEA. There was a lapse of approximately three hours between the first interrogation session and Collazo's subsequent confession. Collazo conferred with his wife in the interim. Finally, at the time of his confession, Collazo stated that he was not acting under pressure of any promise or threat. Based on the "totality of the circumstances," *Spring*, 479 U.S. at 573, 107 S.Ct. at 857, we conclude that Collazo freely and voluntarily waived his fifth amendment rights.

The brightline rule of *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), has also been satisfied. *Edwards* requires that "an accused, . . . having expressed his desire to deal with police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges or conversations with the police.*" *Id.* at 484, 101 S.Ct. at 1884 (emphasis added). Since we hold that Collazo initiated the subsequent talks free from the taint of the earlier improprieties, Collazo's confession does not run afoul of *Edwards*.

We also agree with Judge Trott that the policemen's statements to Collazo after he had invoked his right to remain silent, and before the police terminated the interrogation, constituted "interrogation" under *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). "But that is not the end of the inquiry. It must also be established that a suspect's incriminating response was the *product* of words or actions on the part of police. . . ." *Id.* at 303, 100 S.Ct. at 1691 (emphasis added). The evidence in the record establishes no causal link between Collazo's confession and the prior conduct of the police.

AFFIRMED.

TROTT, Circuit Judge, dissenting:

I respectfully dissent. This case involves unmitigated and glaring police misconduct designed to undercut the *Miranda* warnings to which Collazo was entitled. In one breath the police told him he had certain rights, but in the

next--when Collazo indicated he wished to avail himself of those rights--he was told that if he exercised them, he might be penalized for doing so. Here is the post advice of rights exchange as it was recorded on tape:

> Collazo: Can, I talk, you know, talk, talk to a lawyer?
>
> Destro: This is your last chance to talk to us, though. You understand that. Once you get a lawyer, he's gonna say forget it. You know, don't talk to the police. Then it might be worse for you.
>
> Collazo: Pardon me.
>
> Destro: Then it might be worse for you.
>
> Collazo: Why?
>
> Destro: Because, ah, you know, there's other people in this thing, and we would like to get everybody. If you don't want to talk about, uh--
>
> Rolen: Well, he's asked for a lawyer, so why don't we, I guess we'll leave our interview right here.
>
> Collazo: If, ah, if ah, this gonna be difficult for you, you know, for me it means a lot, you know.
>
> Destro: If you're arrested for murder, it does mean a lot.

The police then departed, leaving Collazo to ponder whether he could afford to exercise his constitutional rights. Three hours later, and still in the interview room where he had been left, Collazo called back the police. He then abandoned his request for a lawyer, allegedly waived his rights, and confessed.

The ultimate question for us to resolve is "whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution. . . ." The same case that frames this question for us, *Miller v. Fenton*, 474 U.S. 104, 112, 106 S.Ct. 445, 450, 88 L.Ed.2d 405 (1985), also mandates that this is a "matter for independent federal determination." *Id.* at 412, 106 S.Ct. at 451. The court in *Miller* rejected the argument that the voluntariness of a confession is a factual issue and that state court findings of fact shall be presumed to be correct in a federal habeas corpus proceeding, pointing out that "[f]or several reasons we think that it would be inappropriate to abandon the court's long-standing position that the ultimate question of the admissibility of a confession merits treatment as a legal inquiry requiring plenary federal review." *Id.* at 115, 106 S.Ct. at 452.

In my view, the threat of "things going worse" for Collazo if he relied on his rights caused him to abandon his request for a lawyer, as he so testified in a futile attempt to suppress his confession. There is nothing in the record that explains his change of mind, except the weight of the explicit threat hanging over his head. Nothing. The prosecution failed utterly to carry its heavy burden in this respect of demonstrating a break in the causal connection between the threat and the so-called waiver and subsequent confession. Neither the passage of three hours, a talk with his wife, his previous experience as an informer, nor his predictable formalistic denial that he was motivated by threats convinces me that his subsequent waiver was the product of anything other than flagrant police misconduct. Collazo obviously didn't want things to go worse for him if he talked to a lawyer and relied on his right to remain silent, so he talked to the

police--who had no business whatsoever making representations regarding the eventual outcome of legal proceedings without first talking to a prosecutor. The irony is that the inducement in the threat made by the police to Collazo to get him to talk was false. By talking to the police and giving up both his right to consult with a lawyer and his right to remain silent, not only did things not go better for Collazo, as the police intimated they would, but he talked himself right into a conviction of first degree murder and a sentence of 26 years to life. How could it have been much worse?

It also strikes me that the quoted dialogue between Collazo and Office Destro runs afoul of *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980) which points out that "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Under this definition, Destro's threatening response to Collazo's request to talk to a lawyer amounts purely and simply to interrogation, and to interrogation prohibited by *Miranda* itself. As I see it, Destro's statements to Collazo were not only "improper," as conceded by the majority, but they constituted an outright violation of *Miranda* as well as *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) (requiring the police to respect immediately the evocation by a suspect of his rights). I fail to see any way that it can be said that Destro's conduct did not amount to a prohibited "practice that the police should know is reasonably likely to evoke an incriminating response from a suspect. . . ." *Rhode Island v. Innis*, 446 U.S. at 301, 100 S.Ct. at 1689.

With all due respect to my colleagues, I see this case as inconsistent with the collective teaching of *Miranda v. Arizona*, 384 U.S. 436, 467, 86 S.Ct. 1602, 1624, 16 L.Ed.2d 694 (1984) (". . . without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."), *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S.Ct. 2560, 2572, 61 L.Ed.2d 197 (1979) ("First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception."), *United States v. Tingle*, 658 F.2d 1332 (9th Cir. 1981) (condemning the process of inducing a confession by describing the negative consequences of refusing to cooperate with investigators), and *Colorado v. Spring*, 479 U.S. 564, 573, 107 S.Ct. 851, 857, 93 L.Ed.2d 954 (1987) ("only if the 'totality of the circumstances surrounding the interrogation' reveal . . . an uncoerced choice . . . may a court properly conclude that the *Miranda* rights have been waived."); and I have my doubts that it could even have survived pre-*Miranda* review under *Haynes v. Washington*, 373 U.S. 503, 513, 83 S.Ct. 1336, 1343, 10 L.Ed.2d 513 (1963) ("[A] confession obtained by police through the use of threats is violative of due process . . . '[T]he question in each case is whether the defendant's will was overborne at the time he confessed.'").

Miranda has been the law since 1966. The overwhelming number of law enforcement officers in our country abide faithfully by its requirements even though it sometimes frustrates their job. Periodically, some persons in law enforcement, as well as certain legal scholars, call

for the abandonment by the Supreme Court of *Miranda* requirements. But, as long as it is the law of the land, it must be respected. It was not honored in this case; in fact, it was egregiously disobeyed. Moreover, under no circumstances can it be said that this error of admitting Collazo's confession in evidence was harmless under *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

This case grates against one of the enduring observations of our jurisprudential history--Justice Brandeis' timeless dissenting remarks in *Olmstead v. United States*, 277 U.S. 438, 485, 48 S.Ct. 564, 575, 72 L.Ed. 944 (1928):

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the laws scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

In my view, the petition should be granted and the writ of habeas corpus should issue.

Before GOODWIN, Chief Judge, BROWNING, WALLACE, HUG, TANG, SCHROEDER, FLETCHER, FARRIS, PREGERSON, ALARCON, POOLE, NELSON, CANBY, NORRIS, REINHARDT, BEEZER, HALL,

WIGGINS, BRUNETTI, KOZINSKI, NOONAN, THOMPSON, O'SCANNLAIN, LEAVY, TROTT, FERNANDEZ, and RYMER, Circuit Judges.

Upon the vote of a majority of nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3.

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DENNIS ROSA COLLAZO,
Plaintiff,
vs.
WAYNE ESTELLE,
Defendant.

NO. C 87-20481 RPA

ORDER DENYING APPLICATION FOR WRIT OF HABEAS

INTRODUCTION

Dennis Rosa Collazo seeks a writ of habeas corpus releasing him from a conviction and sentence of a state court for first degree murder, burglary, and conspiracy to commit robbery and burglary. For reasons stated below, the application is denied.

EXHAUSTION

Prisoners in state custody who wish collaterally to challenge the length of their confinement by writ of habeas corpus must first exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c); see Rose v. Lundy, 455 U.S. 509, 515-520 (1981). Thus, the petitioner must raise each and every claim sought to be raised in federal court before the

highest available state court or show the existence of circumstances which would excuse exhaustion. Kellotat v. Cupp, 719 F.2d 1027, 1029 (9th Cir. 1983).

Plaintiff definitely did appeal his conviction and sentence to the California Court of Appeal. The appeal was denied in a twenty-three page opinion. Petitioner then allegedly sought and was denied review by the California Supreme Court. Plaintiff contends that he raised on appeal and in his petition to the supreme court the exact same issues that he raises in his present application. This allegation is sufficient to satisfy the exhaustion requirement. This Court is free to consider the merits of the application.

THE MERITS

Petitioner raises a single issue in seeking relief from the state court judgment and sentence. Rosa contends that his statements to the police were admitted into evidence erroneously because "the prosecution failed to establish beyond a reasonable doubt that the statement was voluntary and that it did not result from an impermissible form of compulsion in violation of the Fifth and Fourteenth Amendments to the United States Constitution." Petition for Writ of Habeas Corpus at 4.

Having reviewed the application, the Court finds that petitioner's conviction was not tainted by the unconstitutional admission of evidence. Applying the standards of Edwards v. Arizona, 451 U.S. 477, 482-86 (1981),[1/] which petitioner has invoked, it is clear that Mr. Rosa did invoke his right to the assistance of counsel in the first round of his interview by police.

However, it is equally clear that petitioner

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1. See also Smith v. Illinois, 469 U.S. 91, 95 (1984).

voluntarily initiated a second round of discussions with the police. It was at that second discussion or interview that petitioner uttered the damaging statement. This Court agrees with the California Court of Appeal's analysis of the statement and the appellate court's conclusion that the statement was not tainted by any alleged prior coercion by the police. It is clear beyond a reasonable doubt that petitioner's request for the officers to return was made voluntarily. Moreover, considering Rosa's background and work experience as an agent for the Drug Enforcement Administration, Rosa's voluntary request to renew his discussions with the police, and the police officers' conduct, it is evident that the waiver of his rights was done knowingly and intelligently. Therefore, the admission of his statement into evidence at the trial was not in contravention of Rosa's constitutional rights.

Good cause appearing therefor, the application for a writ of habeas corpus is denied.

IT IS SO ORDERED.

DATED: February 22, 1988

ROBERT P. AGUILAR
United States District Judge

APPENDIX D

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE OF THE
STATE OF CALIFORNIA,

Plaintiff and Respondent, A031372

v. (Santa Clara County
Sup.Ct. No. 85499)

DENNIS ROSA COLLAZO,

Defendant and Appellant.
_____/

A jury found defendant Dennis Rosa Collazo quilty of first degree murder (Pen. Code, § 187),[1/] burglary (§ 459), and conspiracy to commit robbery and burglary (§§ 182, 211, 459). The jury also found that during the commission of these crimes defendant had been armed with a firearm (§ 12022, subd. (a)). Sentenced to state prison for terms prescribed by law, defendant appeals from the judgment of conviction. We affirm.

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1. Statutory references are to the Penal Code unless otherwise indicated.

I

There is no need to summarize the substantial body of evidence because the parties are familiar with it, and because defendant does not challenge its sufficiency to support his convictions. Additional evidence will be discussed later in this opinion, but the following narrative, viewing the evidence most favorably to the prosecution (People v. Fosselman (1983) 33 Cal.3d 572, 578), will suffice for present purposes.

The events at issue have their origin in the drug-related problems of Madelyn (or Madeline) Medina, who is defendant's niece. By the summer of 1982 she had run up a considerable debt for cocaine to her dealer, Douglas Metzger. Defendant, who worked for the federal Drug Enforcement Administration (DEA),[2/] was aware of this situation and the fact that Medina had been threatened by the dealer if she did not pay. In early September of that year Medina asked defendant if he could "set up" the dealer and have him imprisoned. Nothing came of this because Medina refused to testify against the dealer and

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2. Just what defendant's status was with the DEA cannot be established with any precision. Defendant described himself (and was described by his former boss) as not an actual agent or a peace officer, but a "confidential operator" who worked undercover setting up drug sales. He was paid a weekly salary plus "commissions" from arrests. His role appears to have been that of an informant.

defendant believed the dealer was too small for the DEA to go after.

The following events occurred on September 13, 1982:

Defendant received an early morning telephone call from Medina, who asked him to come to her apartment to discuss her problem. Defendant drove his silver Datsun 280Z to East Palo Alto, where he picked up his cousin, Ricky Laureano. Telling Laureano that they were going to make some money, defendant drove them to Medina's San Jose apartment. Inside the apartment were Medina and Ernie Garcia, her boyfriend. Medina proposed that they "rip off" the dealer. She drew a diagram of the dealer's house, indicating where drugs and money were located. Medina and Garcia made statements that the dealer would not be present and only his wife would be in the house; that no gun would be in the house: that "it could be done"; and that "it was easy." Defendant told Medina: "Let's go, let's go on with this program."

The four drove in separate vehicles to a store, where Garcia bought some tape to be put over the mouth of the dealer's wife. Laureano left defendant's vehicle, Medina got in, and she and defendant drove away. Medina showed defendant the dealer's house. They returned to the store, where Medina got out of defendant's vehicle and Laureano reentered it. As they were driving to the dealer's house, defendant told

Laureano that the tape (which defendant now had) was to be put on "the lady's mouth so that she couldn't say anything"; that no one was to be hurt; that they were going to a house and defendant wanted Laureano to "go by the door with him"; that this was how Laureano would make money; and that "this job can be pulled off because it's really easy" and the lady "is not going to fight."

Defendant parked his Datsun near the Metzger house. He admitted that he went there to "rip off this guy," but as he and Laureano were walking towards the house he decided it was "a foolish thing to do." They returned to the Datsun and drove around the corner to where Medina and Garcia were waiting. Defendant left his automobile, spoke to Garcia and Medina briefly, and then returned to his Datsun. Defendant told Laureano that it was "no good." Defendant drove Laureano home.

Later that night, at a birthday party for her daughter, Medina suggested to defendant that he talk to the dealer. She told defendant that she would call somebody to go with him. Defendant agreed. Medina had earlier made a telephone call to Durey Watson at about 6:30, asking Watson for help in the form of "a backup."[3/] Watson told her to call back at about 8:30. Defendant was with Madelyn at approximately 8:30 when

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3. Watson was eventually convicted as an accessory. His conviction was recently affirmed by this court. (People v. Watson (1985) 175 Cal.App.3d 1059.)

she made some telephone calls. Watson was not home at that time, but a black man named Tony Young apparently was.

After defendant collected the keys to his Datsun from his wife at the party, he and Medina went to a store where they met Young. Madelyn explained what defendant and Young were supposed to do. Young had a gun, but both defendant and Medina told him there was no need for it. In separate vehicles, defendant and Young proceeded to Metzger's house.

When defendant and Young knocked on the front door at about 10:30, it was answered by Mrs. Metzger. Defendant asked to speak to Mr. Metzger. As Metzger was coming to the door, defendant (who was observed by Mrs. Metzger to have a gun) and Young rushed in. The three men began fighting for possession of the gun. Metzger yelled to his wife to get help. He also yelled "My wife. My kids," to which either defendant or Young replied: "We are not here for your wife or your kids, we are here for you."

Mrs. Metzger ran to a neighbor's house, asked that police be summoned, and returned to her home. Seeing that the fight was still going on, Mrs. Metzger threw a log through a window. Some broken glass hit defendant. Mrs. Metzger yelled that police were coming. Returning to her neighbor's house, she saw defendant run out of the house several seconds later. He ran to his vehicle an drove away quickly. Thereafter Mrs. Metzger

heard several gunshots and saw Young run out of her house.

Metzger died that night from two gunshot wounds to his chest. Defendant went to Mexico (apparently on DEA business) and was arrested two weeks later.

REVIEW

II

Defendant first contends that the trial court erred in ruling, following an evidentiary hearing, that evidence of statements made by defendant during custodial interrogation after his arrest would be admissible at his trial. Defendant continues to insist that the evidence should have been excluded because the statements were elicited in violation of Miranda v. Arizona (1966) 384 U.S. 436.

The trial court's ruling is to be reviewed according to familiar rules. "This court must examine the uncontradicted facts surrounding the making of the statements to determine independently whether the prosecution met its burden and proved that the statements were voluntarily given without previous inducement, intimidation or threat. [Citations.] With respect to the conflicting testimony, the court must 'accept that version of events which is most favorable to the People, to the extent that it is supported by the record.' [Citation.] The burden of proof which must be sustained by the prosecution on questions of voluntariness is proof beyond

a reasonable doubt." (People v. Hogan (1982) 31 Cal.3d 815, 835; see People v. Murtishaw (1981) 29 Cal.3d 733, 753; People v. Jimenez (1978) 21 Cal.3d 595, 609.) If the trial court determines that the prosecution met its burden on a Miranda issue such as voluntariness or waiver, the defendant on an ensuing appeal has the burden of establishing that the lower court's ruling was palpably erroneous, which is to say that it lacks the support of substantial evidence. (See People v. Whitt (1984) 36 Cal.3d 724, 745, fn. 15; People v. Duren (1973) 9 Cal.3d 218, 237-238; People v. Claxton (1982) 129 Cal.App.3d 638, 649; People v. Paradise (1980) 108 Cal.App.3d 364, 369-370.) With these principles in mind we turn to the record.

Almost all of the pertinent circumstances are without dispute. Defendant was arrested at about 11:15 a.m. on September 27. He was first interviewed by Sergeants Destro and Rolen at about 1 p.m. that same day. Defendant was advised of his Miranda rights. He invoked those rights by telling the officers "I want to talk to a lawyer." One of the officers responded: "Once you get a lawyer, you're going to say forget it, don't talk to the police. Then it might be worse for you." When defendant asked "Why?" the officer explained: "Because there's other people involved in this thing and we would like to

get everybody."[4/] The interview was thereafter terminated and defendant was allowed to call his wife, who is a legal secretary.

When Sergeants Destro and Rolen left to arrest Ms. Medina, defendant was left with Sergeant Parrott. Defendant's wife arrived and spoke with him in the interview room. Defendant asked Parrott "Where are the investigators?" Parrott construed this as indicating that defendant "wanted to talk to them as soon as they could get back." Rolen and Destro arrived at about 4 p.m. and met with defendant. Defendant was again advised of his constitutional rights. He made numerous incriminating admissions in the ensuing conversation.

The focus of the contradicted testimony is very narrow. Defendant testified that at the end of the first interview Destro told him that "I better talk to them because . . . somebody was looking for me to kill me." Destro and Rolen denied that any such statement had been made. Defendant testified that as a result of this purported comment "I was threatened by the police" and that this was why he agreed to talk to the officers.

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4. These statements are taken from a tape recording of the interview. This tape, and one of the subsequent interview, were received in evidence and heard by the trial court before ruling. The tapes were also played for the jury at the trial. The tapes have been forwarded to this court and reviewed in connection with defendant's contention.

One of the fundamental tenets of Miranda and numerous California decisions is that once an accused invokes his rights all questioning must cease and any statement thereafter made is inadmissible. (E.g., Miranda v. Arizona, supra, 384 U.S. 436 at pp. 444-445, 473-474; People v. Pettingill (1978) 21 Cal.3d 231, 237-241.) This principle is not ironclad, for it admits of the exception that the suspect may voluntarily initiate a new round of interrogation and make admissible any statements made. (Miranda v. Arizona, supra, at p. 478; People v. McClary (1977) 20 Cal.3d 218, 226; People v. McDaniel (1976) 16 Cal.3d 156, 172; see Edwards v. Arizona (1981) 451 U.S. 477, 484-485; People v. Turner (1984) 37 Cal.3d 302, 320.)

There is no argument by the Attorney General that the statement "it might be worse for you" constituted improper coercion. (See People v. Jimenez, supra, 21 Cal.3d 595 at p. 606 ["it has been held that even '[t]he slightest pressure . . . by way of . . . threat if confession is upheld, is sufficient to require . . . exclusion . . .'"]) Nevertheless, defendant's statements at the second interview would be purged of this illegality,[5/] and would

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5. The trial court did not make express findings concerning (1) whether Sergeant Destro did make the statement that somebody was looking for defendant to kill him or (2) whether this threat (if it may be so characterized) was purged of any illegality by reason of defendant's initiation of the second interview. These questions are largely academic for, as will be seen, the trial court's ruling suffices to answer both adversely to

thus be admissible, if the prosecution establishes a break in the causative chain between the interrogation sessions. (See People v. Hogan, supra, 31 Cal.3d 815 at p. 843; People v. Jimenez, supra, at p. 614.) The trial court's ruling that defendant's statements at the second interrogation were "voluntary beyond a reasonable doubt" and "there is no taint whatsoever to his ultimate statement" is reasonably construed as an acceptance of the prosecution's theory that defendant had voluntarily initiated the second interview. We now sustain that ruling.

In making its ruling the trial court was obligated to take account of "'all the surrounding circumstances--both the characteristics of the accused and the details of the interrogation." (People v. Hogan, supra, 31 Cal.3d 815 at p. 841 [emphasis added].) Defendant, whatever his exact status with the DEA (see fn. 2, ante), is professionally employed in the field of law enforcement. He has had experience with both the state and the federal systems. He has personally been arrested on at least two previous occasions, one of which was in California. Defendant spoke to his wife, herself involved in legal matters, before asking to speak to the investigators. When Destro and Rolen did reappear, defendant was not surprised to see them, nor did he protest at the renewed round of questioning. These factors argue against defendant's claim that his will was overborne by ignorance

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defendant.

and fear. There is nothing on the tape of the second interview--which we have heard and which constituted the primary basis for the trial court's ruling--that supports any conclusion except that defendant did indeed voluntarily cause the officers to be recalled from the field for a subsequent interview.

Our independent review of the record on both legal and factual issues (see People v. Hogan, supra, 31 Cal.3d 815 at p. 835; People v. Murtishaw, supra, 29 Cal.3d 733 at p. 753) persuades us that there is no ground for upsetting the trial court's ruling on defendant's motion.

III

After defendant left the birthday party on the evening of September 13 Ernie Garcia, upon learning of the departure of defendant and Medina, told defendant's wife that "they went to rip him off." The jury heard evidence of this statement after the trial court overruled defendant's objection that it did not come within the coconspirator exception to the hearsay rule. Defendant contends that this was error because the statement was not made by someone (i.e., Garcia) participating in the conspiracy and in furtherance of it as required by Evidence Code section 1223.[6/]

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6. Evidence Code section 1223 provides in pertinent part: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: [¶] (a) The statement was made by the declarant while participating in a conspiracy to commit a crime . . . and

In light of his conduct and other statements on September 13 there can be no doubt that Garcia himself was a member of the conspiracy. It is equally clear from the testimony of defendant's wife that he returned to the party bleeding from a cut on his forehead caused by glass (presumably that broken when Mrs. Metzger threw the log through the window of her house) that Garcia's comment was made before the objective of the conspiracy had been resolved. "The conspiracy usually comes to an end when the substantive crime for which the conspirators are being tried is either attained or defeated. [Citations.] It is for the trier of fact--considering the unique circumstances and the nature and purpose of the conspiracy of each case --to determine precisely when the conspiracy has ended." (People v. Saling (1972) 7 Cal.3d 844, 852; accord People v. Leach (1975) 15 Cal.3d 419, 431.) There is no lack of evidence from which the jury could have determined that the conspiracy was still on-going at the time of Garcia's statement. As for the furtherance requirement, Garcia could have decided that defendant's wife, if she was not already aware of the conspiratorial purpose, ought to be told in order to allay any suspicions about her husband's absence and deter her from taking any actions that might disrupt completion of the scheme. (Cf. People v. Saling,

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in furtherance of the objective of that conspiracy; [¶] (b) The statement was made prior to or during the time that the party was participating in that conspiracy. . . ."

supra, fn. 8.) We find no error.

If the presence of error is assumed, it does not warrant reversal. Defendant argues that admission of the Garcia statement was prejudicial because it constituted the only evidence of his "intent and purpose in going for a second time to the Metzger home," that presumably being the same intent and purpose (i.e., to "rip off" Metzger) as motivated defendant that afternoon. This assumes that defendant had withdrawn from the conspiracy after the abortive first visit to the Metzger home. This assumption is offset by the strong testimony of defendant himself and Laureano that defendant had agreed to the conspiracy. As previously shown, defendant is no stranger to surreptitious contacts with drug dealers. Notwithstanding Medina's statement that she only wanted to talk with the dealer on the second trip, the enthusiasm she had earlier shown for using criminal means for resolving her problem with Metzger had apparently not abated, as evidenced by her independently producing the armed Mr. Young to accompany defendant. Finally, given the lateness of the nocturnal visit to the Metzger household, it is almost impossible to place an innocent construction upon the events in question.

After a considered examination of the record, we believe that the jury concluded defendant was still motivated by the criminal intent which possessed him on the afternoon of September 13. We also believe that a jury which had not heard evidence of Garcia's statement

would reach the same conclusion. Our conclusion is that even if we were to assume error it was harmless. (Cal. Const., art. VI, § 13; Evid. Code, § 353, subd. (b); People v. Saling, supra, 7 Cal.3d 844 at pp. 855-856; People v. Watson (1956) 46 Cal.2d 818, 836.)

IV

Defendant makes several claims of instructional error. We discuss them separately.

A

Defendant contends that his conspiracy conviction must be reversed because "the case was submitted to the jury under instructions alleging [sic] an overt act not charged in the amended information." This contention cannot be sustained.

Three overt acts were alleged in the amended information. The first, pertaining only to Medina, was deleted pursuant to agreement by the parties. The remaining overt acts, now renumbered one and two, were that defendant drove to the Metzger residence and that he entered it. Both acts were alleged in the information to have occurred "on or about the 13th day of September, 1982." When it instructed the jury, however, the trial court described them as occurring "on the evening of September 13th, 1982." This change probably resulted from the fact that the court was reading from instruction forms prepared by the prosecutor, which embody this greater precision. The record shows that at no time did defendant's attorney object, but, on the contrary, he was

aware of the change and used it to his client's advantage.[7]

Section 1104 reads in pertinent part: "Upon a trial for conspiracy, in a case where an overt act is necessary to constitute the offense, the defendant cannot be convicted unless one or more overt acts are expressly alleged in the indictment or information, nor unless one of the acts alleged is proved. . . ." Despite this requirement of an express allegation of the overt act, it is not incumbent upon the prosecution to specify at what time such overt act is supposed to have occurred. Section 955 provides: "The precise time at which the offense was committed need not be stated in the accusatory pleading, but it may be alleged to have been committed at any time before the finding or filing thereof, except where the time is a material ingredient in the offense."

The exact time of the overt acts was not a "material ingredient." Defendant's counsel apparently consented to the change and made good use of it. The requirements of notice and opportunity to defend were

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7. In his closing argument defendant's attorney stated to the jury: "You are going to be instructed by the judge at the close of this case . . . about something that is going to be very important. . . . [O]ne of the things you are going to find out is that the burglary and the conspiracy charged in Counts 2 and 3 relate only to the events that happened on the evening of September the 13th, 1982. Mr. Collazo is not charged with any burglary or any conspiracy or . . . any other crime relating to what happened at that house at noontime."

satisfied. (Cf. People v. Geiger (1984) 35 Cal.3d 510, 526.) Even if it should be determined that there was error, it could not be regarded as prejudicial. (See § 960; People v. Paul (1978) 78 Cal.App.3d 32, 42-44.)

B

Defendant contends, to quote from the caption in his brief, that the trial court erred "in failing to instruct the jury sua sponte that Ricky Laureano was or could be considered an accomplice to the conspiracy . . . whose testimony required corroboration."

Section 1111 specifies that a conviction can only be based upon the corroborated testimony of an accomplice, who it defines as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." "Under the applicable rule that the court must, on its own motion, give instructions in criminal cases on the general principles of law pertinent to the case on trial, the court is required to instruct on the need for corroboration of an accomplice's testimony whenever the testimony given upon the trial is sufficient to warrant the conclusion on the part of the jury that a witness implicating a defendant was an accomplice." (People v. Pic'1 (1981) 114 Cal.App.3d 824, 872.)

There can be little doubt that Laureano was an accomplice to the conspiracy. His own testimony concerning the conversation at Medina's house prior to the afternoon trip to the Metzger house is adequate to

support inferences (1) that there was a conspiracy and (2) that he was a member of it. The same inferences could be drawn from defendant's testimony. The fact that Laureano testified only after the trial court insisted he obtain legal advice regarding possible self-incrimination supports this view.[8/] The trial court therefore erred in not instructing the jury, on the court's own motion if necessary, that Laureano's testimony concerning the conspiracy charge had to be corroborated.

This error does not, however, compel reversal. The evidence corroborating an accomplice's testimony need only be slight. (See People v. Szeto (1981) 29 Cal.3d 20, 27.) As previously noted, the substance of Laureano's testimony was in effect replicated by, and was cumulative to, defendant's own testimony respecting the conspiracy. In light of this circumstance, the error was harmless. (Cal. Const., art. VI,, § 13; People v. Watson, supra, 46 Cal.2d 818 at p. 836.)

C

Defendant next contends that the trial court erred by instructing the jury with the former versions of CALJIC Nos. 3.00 ("Principals--Defined") and 3.01 ("Aiding and Abetting--Defined") subsequently condemned

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8. The same judge who presided over defendant's trial also conducted the trial of Durey Watson (see fn. 3, ante) at which Laureano testified, likewise only after the court insisted Laureano speak with counsel regarding self-incrimination.

in People v. Beeman (1984) 35 Cal.3d 547. These instructions were held to be erroneous because "they did not advise the jury that conviction as an aider and abettor required not only that the defendant have knowledge of the criminal purpose of the perpetrator of the offense, but also that the defendant share that purpose or intent to commit, encourage, or facilitate the commission of the crime." (People v. Croy (1985) 41 Cal.3d 1, 11-12; People v. Beeman, supra, at p. 560.) Because Beeman is retroactive to this appeal (People v. Croy, supra, at p. 12), defendant's claim of error has merit. We now examine whether this error was prejudicial.

The Supreme Court has identified four situations in which Beeman error does not call for reversal. The first is where the instruction is given in connection with an offense for which the defendant is acquitted. The second is where the defendant conceded the issue of intent. Neither of these possibilities is present in this case.

The third is instances where the factual question posed by the omitted instruction is necessarily resolved adversely to the defendant under other, properly given instructions. (People v. Croy, supra, 41 Cal.3d 1 at p. 13 [citing People v. Sedeno (1974) 10 Cal.3d 703, 721].) This exception is properly applied here. The trial court instructed the jury with CALJIC No. 6.10 ("Conspiracy and Overt Act--Defined"), which as relevant here, reads: "A conspiracy is an agreement entered into between two or more persons with the specific intent to agree to commit

the public offense of burglary or robbery and with the further specific intent to commit such offense, followed by an overt act . . . . [¶] In order to find the defendant guilty of conspiracy, in addition to proof of the unlawful agreement and the specified intent, there must be proof of the commission of at least one . . . overt act. . . . [¶] The term 'overt act' means any step taken or act committed . . . which . . . is done in the furtherance of the accomplishment of the object of the conspiracy." (Emphasis added.)

This instruction clearly made defendant's intent an issue. It required the jury to convict only if convinced that defendant had formed the specific intent to commit a crime and (because both of the overt acts involved only defendant) that he had completed an overt act "in furtherance of . . . the conspiracy." In short, defendant could not have been convicted of conspiracy without the jury necessarily having resolved adversely to defendant the intent element missing from the instructions disapproved in Beeman. Accordingly, the Beeman error was harmless.

We do not rest our rejection of defendant's contention on this ground alone. The fourth exception not requiring reversal was explained in Croy as follows: "[T]he parties at least recognized that the defendant's state of mind was at issue, so that a defendant who only accidentally or unintentionally aided the commission of a crime, or otherwise acted without the requisite intent, has a substantial incentive to place such evidence before the

jury, frequently in conjunction with a claim that he had no knowledge of the perpetrator's unlawful purpose. Thus, in many cases there may be no unfairness in assuming . . . that the record as made is no different from the record that would have been made had the defendant known that the more precise instruction required by Beeman should be given. Since, under former CALJIC No. 3.01, the jury could convict a defendant on an aiding and abetting theory only if it found that he acted with knowledge of the perpretrator's criminal intent, it may be possible in those cases for a court to determine that the Beeman error could not possibly have affected the verdict --i.e., that no reasonable trier of fact, having actually found the requisite knowledge, could at the same time have concluded that the defendant did not act for the purpose of facilitating or encouraging the crime. In those cases the judgment could be affirmed." (People v. Croy, supra, 41 Cal.3d 1 at p. 14.)

It is particularly appropriate to apply this saving analysis here. Because he was charged with conspiracy, defendant's intent was very much at issue regardless of his possible liability as an aider and abettor. Laureano's testimony, together with reasonable inferences deducible therefrom, put before the jury the existence and scope of the conspiracy. Medina, Garcia, and Young did not testify. Defendant was thus obliged to testify because only he could present evidence on two critical points: (1) that he had withdrawn from the conspiracy following the

abortive afternoon visit to the Metzger home, and (2) that his subsequent visit that night was the result of a wholly innocent motive unrelated to any conspiracy. Defendant was therefore arguing that he was unaware of any illegal purpose of Young and/or Medina at the time of the nocturnal trip to the victim's house. Defendant thus had "a substantial incentive" to present evidence pertaining to his lack of criminal intent. The issue of intent figured prominently in defense counsel's closing argument to the jury.[9/] Defendant identifies no witnesses who could have

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9. The following are excerpts from that argument: "Why did Dennis Collazo go to that residence on the evening of September 13th, 1982? That is in dispute. . . . [¶] [A]t the outset of my argument, I read to you an instruction; namely, the issue in this case is why did he go over that night. . . . [¶] Given all the facts and all the circumstances that you know about, is it reasonable to conclude that Dennis Collazo went to 5694 Keymar Drive in San Jose on the evening of September the 13th, 1982 in order to talk with Douglas Metzger? You bet it's reasonable . . . . I submit to you based on the totality of the evidence, that it's more reasonable to think that he went over there that evening to talk to him than it was to rob him for all the reasons that I have spent a substantial period of time talking to you about. . . . I submit to you in fact, he went there to talk to him and that the evidence shows it. You may or may not agree with me, but the only way that you may return a verdict of guilty is if you conclude that it is totally unreasonable to think that he went over there to talk . . . . [¶] He had given up the intent to rob at noontime. . . . There was no point in going. . . . there

testified on his behalf but who were not called or were otherwise unavailable to bolster his story. In short, defendant produced all the evidence on intent that he could.

It must be assumed that, even with the defective Beeman instructions, the jury found that defendant had the requisite knowledge of another's criminal intent. Because it found him guilty of conspiracy, the jury further found that defendant had intentionally committed acts at Metzger's house which would effectuate the object of the conspiracy. In these circumstances it defies logic to believe that the jury "concluded that the defendant did not act for the purpose of facilitating . . . the crime." (People v. Croy, supra, 41 Cal.3d 1 at p. 14.)

For each and both of these grounds, we conclude that the Beeman error was harmless in that there is no reasonable probability of a more favorable result. (Cal. Const., art. VI, § 13; People v. Croy, supra, 41 Cal.3d 1 at p. 14; People v. Watson, supra, 46 Cal.2d 818 at p. 836.)

D.

Defendant's fourth and final claim of instructional error builds on his third. Proceeding from the premise that there was prejudicial Beeman error, he argues: "It is a settled principle of appellate law that when the prosecution presents its case to the jury on alternative theories, and error has occurred which would

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unless he was going to talk . . . ."

require reversal if one of those theories was used by the jury, but not if the other was used, the conviction cannot stand if the reviewing court is unable to determine from the record which theory was used." Defendant's statement of this "settled principle" is only partially correct. Its true formulation is that "when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (People v. Green (1980) 27 Cal.3d 1, 69.) But however the principle is worded, it does not displace the doctrine of harmless error. Thus, in People v. Anderson (1965) 63 Cal.2d 351, 360, the court reversed a murder conviction due to insufficient evidence of intent but only after noting that "the instant case is not one in which the erroneous instructions caused only harmless error."

The discussion in the preceding section demonstrated that the Beeman error was harmless according to two possible theories. There is accordingly lacking the predicate upon which the quoted principle operates--the presence of prejudicial error with regard to one of the alternate theories used by the prosecution. Lacking as it does this crucial prerequisite, defendant's contention necessarily fails.

V

Defendant's last contention is that this court

should employ People v. Dillon (1983) 34 Cal.3d 441 to modify the judgment by reducing his murder conviction from first to (at the least) second degree. We cannot agree.

Dillon involved the first degree felony-murder conviction of a minor which was reduced to second degree by reason of the prohibition against cruel or unusual punishment of the California Constitution. Unlike Mr. Dillon, defendant is not an immature youth but an adult employed by a law enforcement agency of the federal government. Unlike Mr. Dillon's case, the prospect of defendant being sentenced to state prison for a very substantial term at no time elicited the slightest sympathy from the jury, the trial court, or the probation officer. Finally, unlike Mr. Dillon and his codefendants, defendant's punishment is not shown to be grossly disproportionate when considered with others: the probation report shows that Watson received two years in state prison, Medina received seven years at the California Institution for Women, and Young, who pleaded guilty to first degree murder, had not been sentenced at the time of defendant's sentencing hearing. Defendant admitted that he had at some point formulated the intent to commit a crime. Despite his status as a quasi-law enforcement officer, he did not make the slightest attempt to notify police of either the danger to Mr. Metzger or the identity of those who wished him ill. To the contrary, the record does show that defendant left the country after the

crime and did not return for at least a week.

In light of these circumstances, we feel no compulsion to reduce the degree of defendant's murder conviction.

The judgment of conviction is affirmed.

_____

Sabraw, J.

WE CONCUR:

_____

Anderson, P.J.

_____

Poche, J.

CERTIFICATE OF SERVICE BY MAIL

WAYNE ESTELLE,
Petitioner,
v.
DENNIS ROSA COLLAZO,
Respondent.

No.

AILEEN BUNNEY, a member of the Bar of the Supreme Court of the United States, states:

That her business address is 455 Golden Gate Avenue, Suite 6200, in the City and County of San Francisco, State of California; that on September 27, 1991, she served a true copy of the attached Petition For Writ Of Certiorari To The United States Court Of Appeal For The Ninth Circuit in the above-entitled matter on respondent by placing same in envelope addressed as follows:

William D. Farber
Attorney at Law
P.O. Box 2026
San Rafael, California 94901

Said envelope was then sealed and deposited in the United States Mail at San Francisco, California, with the postage thereon fully prepaid.

Aileen Bunney

AILEEN BUNNEY
Deputy Attorney General

Supreme Court, U.S.
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(2)

No. 91-596

In The

Supreme Court of the United States

October Term, 1991

WAYNE ESTELLE,

Petitioner,

v.

DENNIS ROSA COLLAZO,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a state court's determination that a confession was not the product of a violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), or other coercive police activity, is a finding of fact which is entitled to a presumption of correctness under 28 U.S.C. § 2254(d)

2. Whether a state court's determination that a defendant validly waived his rights under *Miranda v. Arizona* is a finding of fact which is entitled to a presumption of correctness on federal habeas corpus.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT 2

ARGUMENT – REASONS FOR DENYING THE PETITION 3

CONCLUSION – THE PETITION SHOULD BE DENIED 7

TABLE OF AUTHORITIES

Page

CASES

Ahmad v. Redman, 782 F.2d 409 (3d Cir. 1986) 5

Collazo v. Estelle, 940 F.2d 411 (9th Cir. 1991) 2, 3, 5, 6, 7

Derrick v. Peterson, 924 F.2d 813 (9th Cir. 1990) 5

Giordenello v. United States, 357 U.S. 480 (1958) 4

Miller v. Fenton, 474 U.S. 104 (1985) 4, 5, 7

Miranda v. Arizona, 384 U.S. 436 (1966) 3

Parker v. Dugger, 498 U.S. ___, 112 L.Ed.2d 812, 111 S.Ct. 731 6

Sumner v. Mata, 455 U.S. 591 (1982) 6

Terravona v. Kincheloe, 852 F.2d 424 (9th Cir. 1988) 5

Wainwright v. Goode, 464 U.S. 78 (1983) 6

STATUTES

UNITED STATES CODE

Title 28, § 1254(a) 2

Title 28, § 2254(d) 2, 3, 5

Title 28, § 2254(d)(8) 6

CALIFORNIA PENAL CODE

§ 187 3

No. 91-596

In The

Supreme Court of the United States

October Term, 1991

WAYNE ESTELLE,

Petitioner,

v.

DENNIS ROSA COLLAZO,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

The respondent respectfully prays that the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed July 18, 1991 following rehearing en banc, be denied.

OPINION BELOW

The en banc opinion of the United States Court of Appeals for the Ninth Circuit is fully reported at 940 F.2d 411. Petitioner's reproduction of the en banc opinion at

Pet. App. A, pp. 43-44 is incomplete; a portion of the dissent has been omitted.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 18, 1991. The petition for a writ of certiorari was filed on September 27, 1991 and docketed on October 1, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

STATUTE INVOLVED

Title 28 U.S.C. § 2254(d).

STATEMENT

For purposes of this Brief and with the following exceptions, respondent adopts the statements of fact summarized by the Court of Appeals in *Collazo v. Estelle*, 940 F.2d at 413-414 and the California Court of Appeal, First Appellate District, Division Four (Pet. App. D, at pp. 78-82.).

Respondent, a Drug Enforcement Administration (DEA) confidential operator working in California, Texas, New York, and Mexico, was not present when the drug dealer was shot and killed in this case. During the brawl, to which the Court of Appeals referred in its opinion, and prior to the killing, *Collazo*, 940 F.2d at 413, respondent fled from the drug dealer's home and drove away in his

car. The person who accompanied respondent to the drug dealer's home, with whom respondent had been previously unacquainted, continued the fight. Only after respondent had driven away was the drug dealer shot and killed. Respondent was convicted in violation of Cal. Penal Code, § 187 by virtue of the California felony-murder rule even though he was not present at the time of the killing. There was no evidence that respondent knew that the victim would be killed, intended to kill the victim, or possessed the requisite mental states of malice aforethought and premeditation and deliberation otherwise required to sustain a first degree murder conviction pursuant to Cal. Penal Code, § 187.

ARGUMENT

1. The principal contention of the petitioner in this Court – whether a state court's determination that a confession was not the product of a violation of *Miranda v. Arizona*, 386 U.S. (1966), or other coercive police activity, is a finding of fact entitled to a presumption of correctness under 28 U.S.C. § 2254(d) – was neither raised at any of the proceedings below, briefed by the parties, nor considered by the Court of Appeals for the Ninth Circuit at any stage of the proceedings.

2. In its en banc opinion, the Court of Appeals for the Ninth Circuit states that California (petitioner) argues that factual findings, *"insofar as they pertain to the validity of the alleged waiver,* are entitled to the presumption of correctness mandated by 28 U.S.C. § 2254(d)." *Collazo v. Estelle*, 940 F.2d 411, 414-415 [footnote omitted and

emphasis added]. At all times, petitioner asserted only that the validity of the waiver – not the validity of the confession as raised in the petition for writ of certiorari – was entitled to a presumption of correctness.

3. While purporting not to challenge the holding of *Miller v. Fenton*, 474 U.S. 104 (1985), (see Pet., at p. 14), petitioner actually seeks its demise. During the proceedings below, the petitioner took the opposite position in respect to the principal contention, either conceding or acknowledging that a determination as to the validity of a confession is a legal question.

For example, in the Supplemental Brief filed by petitioner in the Court of Appeals for the Ninth Circuit, dated August 31, 1990, petitioner, citing with apparent approval, inter alia, *Miller v. Fenton*, 474 U.S. 104, stated: "We acknowledge that the ultimate issue of the voluntariness of a confession is a *legal* question requiring independent federal determination." (Emphasis in original.) Thus, not only did petitioner not raise the principal contention at any time in proceedings below but consistently conceded that voluntariness of a confession is a legal and not a factual question – a position completely at variance with petitioner's newly-advanced argument in this Court.

The petitioner should not now be permitted to inject a newly advanced contention or belated theory for the first time here in this Court. *Giordenello v. United States*, 357 U.S. 480, 488 (1958).

4. The second contention raised and analyzed by the petitioner – whether a waiver of rights under *Miranda* is a finding of fact also entitled to a presumption of correctness – is also flawed. The petitioner notes correctly

that the Court of Appeals for the Ninth Circuit treated the validity of a *Miranda waiver* as a mixed question of law and fact. (See Pet., at p. 14, second full paragraph; Pet., at p. 20; see also *Terravona v. Kincheloe*, 852 F.2d 424 (9th Cir. 1988), and *Ahmad v. Redman*, 782 F.2d 409 (3d Cir. 1986) (voluntariness of a waiver is mixed question of law and fact).) Immediately thereafter, the petitioner argues that "it is inappropriate to treat the waiver of *Miranda* rights as a question of law" (*Id.*) The Court of Appeals clearly did not do so, as petitioner incorrectly asserts.

Relying on *Miller v. Fenton*, the Court of Appeals held rather that voluntariness of a waiver is a mixed question of law and fact, requiring de novo review. *Collazo v. Estelle*, 940 F.2d at 415-416; see also *Derrick v. Peterson*, 924 F.2d 813, 821-822 (9th Cir. 1990). Petitioner also fails to mention that in this case the Court of Appeals held that in respect to the awareness prong of the waiver question, in the context of collateral review, a state court's determination that a defendant knowingly and intelligently waived his *Miranda* rights is entitled to a presumption of correctness pursuant to 28 U.S.C. § 2254(d). *Collazo v. Estelle*, 940 F.2d at 416, quoting *Derrick v. Peterson*, 924 F.2d at 823.

5. Moreover, in the state court proceedings, the trial court made no findings – factual or legal – with respect to the issue of waiver. The trial court rather focused on the question of voluntariness which petitioner concedes properly remains a mixed question of law and fact. (See *Collazo v. Estelle, supra*, 940 F.2d at p. 415, fn. 3.)

The California Court of Appeal sustained the trial court's ruling, focusing as well on the issue of voluntariness and not on the issue of waiver. (See Pet. App., at pp.

85-86.) Voluntariness was analyzed by the California appellate court as a function of both law and fact. (See Pet. App., at p. 87.) While federal habeas courts are required by virtue of 28 U.S.C. § 2254(d)(8) and this Court's holding in *Wainwright v. Goode*, 464 U.S. 78 (1983) to give considerable deference to factual determinations made by *any* state court, (as stated in *Parker v. Dugger*, 498 U.S. ___, 112 L.Ed.2d 812, 828, 111 S.Ct. 731 (dissent)), the factual determination to which petitioner would have the federal courts defer was not made by the state courts in this case. Their conclusions were perceived to involve and were consistently analyzed in terms of law and fact which may properly be reviewed by federal courts. (*Sumner v. Mata*, 455 U.S. 591, 597 (1982). Waiver as a distinct factual issue was not addressed by any California state court in this case.

6. The fundamental question at issue in the proceedings below involved the legal impact of police coercion that was conceded by the petitioner to be constitutionally improper. While consistently acknowledging that the police conduct in this case was "constitutionally improper," (see, e.g., Pet., at p. 13; and *Collazo v. Estelle*, 940 F.2d at 418 ("California freely admits on appeal '[t]he police violated Collazo's Miranda rights.' ")), petitioner has consistently failed to address the impact of this coercion on the issue of voluntariness.

When analyzed, petitioner's arguments boil down to a mixed question of law and fact: whether the "finding of coercion, which the Court may review de novo, is patently erroneous." (Pet., at p. 22.) This is a far cry from a presumption of correctness upon which the petition for certiorari has been otherwise ostensibly predicated.

In this vein, the concurring opinion by Circuit Judge Kozinski is most apposite: "[T]he Supreme Court has told us that voluntariness is not merely fact-bound question whether this particular suspect's confession is the product of coercion, but also a legal question about whether the techniques the police used were tolerable." *Collazo v. Estelle, supra,* 940 F.2d at 426.

Attempting to cast its argument in factual terms, the petitioner would have federal courts defer to state courts in the protection of federal constitutional rights in cases involving mixed questions of law and fact. Deference is not abdication. As this Court previously observed in *Miller v. Fenton,* 474 U.S. at 117, a state-court judge is in no better position than a federal habeas court to make a legal characterization of facts.

CONCLUSION

The petition for a writ of certiorari should be denied.

DATED: November 25, 1991.

Respectfully submitted,

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No. 91-596

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WAYNE ESTELLE, WARDEN,
Petitioner,

v.

DENNIS ROSA COLLAZO,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
ARGUMENT	2
CONCLUSION	6

TABLE OF AUTHORITIES

	Page
Cases	
Miranda v. *Arizona* 384 U.S. 436 (1966)	2-4
Oregon v. *Bradshaw* 462 U.S. 1039 (1983)	4
United States Constitution	
XIV Amendment	2-4

No. 91-596

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REPLY TO BRIEF IN OPPOSITION

No. 91-596

ARGUMENT

Petitioner responds to arguments advanced by respondent in his Brief in Opposition in the order in which he presents them.

1. Respondent asserts that petitioner's "principal contention" -- whether a confession was a product of illegal police activity is a question of fact -- was not raised or briefed by the parties, or considered by the Court of Appeals by the Ninth Circuit. In fact, the state courts found that "the prosecution establish[ed] a break in

the causative chain between the interrogation sessions." (App. to Pet. for Cert. at 86.) This statement constitutes a finding of fact in its most pristine form. In his supplemental brief, filed on August 31, 1991, after the grant of rehearing *en banc*, petitioner argued that the state record established a "break in the causal chain" between the officer's improper statement and respondent's decision to initiate a second interview and that therefore the statement was not a product of illegal official conduct. (Supp. Brief at 6.) In short, it has *always* been petitioner's view that the officer's statement was improper but that the subsequent statement was not "fruit of the poisonous tree."

2. Respondent next suggests that until now petitioner has asserted only that the validity of the waiver under *Miranda* v. *Arizona*, 384 U.S. 436 (1966) -- not the validity of the confession -- was entitled to a presumption of correctness. The two issues are inextricably intertwined (see Argument 1), because an invalid waiver cannot produce a valid confession. In addition, respondent fails to reveal that *at no time* did he raise the voluntariness of the confession under the Fourteenth Amendment: not in the state courts, not in the District Court, not in his appeal to the Ninth Circuit, and not in the suggestion for rehearing *en banc*. The issue of the voluntariness of the confession was raised by the Ninth Circuit itself *for the first time* in its *en banc* opinion. In point of fact, the Ninth Circuit "sandbagged" petitioner, and respondent seeks to

exploit this unfairness by suggesting that petitioner failed to raise an issue which, until now, he really had no reason to present.

3. Respondent next contends that petitioner is now attempting to withdraw a concession which he made in the courts below. Specifically, petitioner acknowledged that the voluntariness of a confession is a legal question, "a position completely at variance with petitioner's newly-advanced argument in this Court." (Brief in Opp. at 4.) Petitioner can only repeat what he said in the petition for certiorari: whether the facts as found constitute coercion under the Fourteenth Amendment *is* a legal question, for only this Court or other courts of review can determine whether police conduct is constitutionally permissible. But resolution of a claim that a confession is involuntary also requires a determination that the statement was the *product* of the coercion, a question of cause-and-effect and, therefore, of historical fact. Petitioner has consistently argued that causation is a factual matter. He now argues before this Court that the Ninth Circuit erroneously failed to defer to the state courts' finding that the police impropriety did not produce the statement.

4. As petitioner understands respondent's fourth point, he argues that the validity of *Miranda* waiver presents a mixed question of law and fact. Petitioner can only reiterate that *de novo* review of any aspect of a *Miranda* claim is inappropriate because *Miranda* is not constitutionally compelled. If a state prisoner alleges that

a confession extracted from him was involuntary under the Fourteenth Amendment, he has presented a mixed question which entitles him to *de novo* review on the question whether official conduct amounted to coercion. But where, as here, a prisoner claims only that *Miranda* was violated, he impliedly concedes that the statement was voluntary under the Fourteenth Amendment. The remaining issue -- whether the waiver was valid -- implicates only a prophylactic rule, an issue which should be treated as a question of fact.

5. Respondent next argues that the state courts made no findings with respect to the issue of waiver. In fact, they considered and rejected respondent's *Miranda* claim, finding that he voluntarily initiated the second interview. (App. to Pet. for Cert. at 82-87.) That finding represents a determination of a valid *Miranda* waiver. *See Oregon* v. *Bradshaw*, 462 U.S. 1039 (1983).

6. Finally, respondent suggests that "petitioner has consistently failed to address the impact of [the officer's] coercion on the issue of voluntariness." (Brief in Opp. at 6.) To the contrary, that is really what the petition for certiorari is all about. The state courts found as a matter of fact that the police impropriety (whether "truly" coercive under the Fourteenth Amendment, or "presumptively" coercive under *Miranda*) did not produce the confession. In other words, the state courts found that respondent would have confessed even if the officer had not made his constitutional *faux pas*. Thus, the confession

was the product of an independent source, identified by state courts to be respondent's desire to confess. That identification is a finding of fact, and petitioner respectfully asks this Court to direct the federal judiciary to defer to such findings in this and all cases of this species.

CONCLUSION

For the foregoing reasons, we respectfully ask that the Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit be granted.

DATED: December 3, 1991

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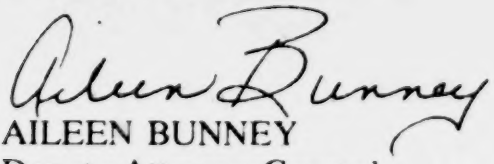

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